Volume

1

REPORT
ON THE
LAW OF TRUSTS

ONTARIO LAW REFORM COMMISSION

Ontario

VOLUME I

1984

Ministry of the
Attorney
General

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Attorney
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The Ontario Law Reform Commission was established by section 1 of the *Ontario Law Reform Commission Act*. Section 2(1) of the Act states that it is the function of the Commission to inquire into and consider any matter relating to (a) reform of the law having regard to the statute law, the common law and judicial decisions; (b) the administration of justice; (c) judicial and quasi-judicial procedures under any Act; and (d) any subject referred to it by the Attorney General. The Commissioners are:

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ONTARIO
LAW REFORM
COMMISSION

Ontario

The Honourable R. Roy McMurtry, Q.C.,
Attorney General for Ontario

Dear Mr. Attorney:

Pursuant to section 2(1)(*a*) of the *Ontario Law Reform Commission Act*, the Commission undertook a study of the law of trusts in Ontario. The Commission has now completed its consideration of the subject and, accordingly, has the honour to submit herewith its *Report on the Law of Trusts*.

FOREWORD

With the submission of the *Report on the Law of Trusts*, the Ontario Law Reform Commission completes another substantial portion of its initial undertaking to review the whole of the law of property in this jurisdiction. The review of the law of trusts was begun some years ago, but circumstances from time to time necessitated that work on the project be interrupted to enable our resources to be applied to more urgent matters. It is with a sense of satisfaction that time and circumstances have now allowed us to bring this important project to fruition.

During the course of our deliberations it became clear that the review and treatment of the law governing the administration of estates of deceased persons, which originally formed part of the law of trusts project, should be dealt with as a separate project. As a result, the project was split and the law of the administration of estates of deceased persons is being considered as a separate subject matter and will form the substance of a subsequent report.

It was also intended to devote a chapter of the report on the law of trusts to the conflict of laws in this area. A research paper was commissioned and prepared on this specific subject. We were then apprised of the fact that The Hague Conference on Private International Law was preparing a draft international convention to be submitted to a plenary session of that Conference in 1984 on recognition and choice of law rules involving trusts. The Commission decided that it should await the results of the work of The Hague Conference before launching into the uncharted seas of formulation or revision of the conflict rules. Consequently, that aspect of the work of the project has been deferred, to be taken up again when the provisions of The Hague Conference are established and known. Canada is a member of The Hague Conference and is represented on the Special Commission preparing the documentation for the plenary session of the Conference in 1984.

The Ontario legislation on trusts dates essentially from the nineteenth century. Most jurisdictions in the common law world have revised their legislation in recent years. Some have even attempted a codification of the substantive law of trusts as well as the law governing their administration.

By a majority of its members, the Commission has decided against a complete codification of the law of trusts and confined its efforts to a wholesale revision of the *Trustee Act* provisions dealing with administration of trusts and has ventured into areas of substantive law where it appeared that present rules of law were so outmoded or unclear as to warrant legislative intervention. For these purposes a Draft Bill accompanies the Report to indicate a possible form for the implementation of the recommendations contained in the Report.

The Commission wishes to record here its special thanks to Professor R.E. Scane, Q.C., the initial director of the Project, and to Professor D.W.M. Waters who succeeded as director and brought the study to fruition. These two acknowledged experts in the field, plus Professors A.H. Oosterhoff, Peter W. Hogg, Q.C., and J.M. Evans, together with Maurice C. Cullity, Q.C., John I. Laskin, Donald J. Grant and the late Fred B. Baker also assisted greatly in the submission of working papers. Professor Waters prepared the initial draft report and L.R. MacTavish, Q.C., former Senior Legislative Counsel for Ontario, prepared the Draft Bill. Although no formal advisory group was constituted for this project, our director and staff had the opportunity to consult from time to time with private legal practitioners specializing in this area of law. We are most grateful to all of them for their generous and helpful assistance. We would emphasize again the outstanding contribution of Professor D.W.M. Waters at all stages of the work of the project.

Counsel to the Commission, Ms. M. Patricia Richardson, and Ms. Pamela M. Gibson of the legal staff of the Commission, bore an unusually heavy burden in connection with the work of the project and we lie heavily in their debt.

The Honourable G.A. Gale and the Honourable J.C. McRuer both held office as Vice-Chairman of the Commission during the course of the project but retired before its completion, and accordingly the policy decisions reflected in the recommendations are not to be attributed to them. To them we extend our thanks for their contribution.

CHAPTER 1

INTRODUCTION

1. GENERAL

The law employs the concept of the trust in many ways, and there is no accepted definition of this concept that covers all modes of use. However, in general terms a trust may be said to exist when one person holds legal title to certain property, while another has equitable title – that is, the right to the enjoyment of that property. The first person, the trustee, is said to hold the property "on trust" or "in trust" for the second person, the beneficiary.[1] Assume, for example, that A holds legal title and that B has the right to enjoyment. A is the nominal owner and, in relation to legal title, has the right to sell, lease, mortgage, or otherwise deal with the property, and the right of management.[2] On the other hand, B is the beneficial owner, and is entitled to the income or "fruits" of the property, and possibly to the property itself.

Generally, a trust may arise in one of two ways: either by words or acts of a person that indicate an intention to create a trust, or by the law imposing a trust in certain situations to ensure that equitable title passes from one person to another. Within these two broad categories, it is usual to classify trusts as express, implied, resulting, or constructive, although there exist differing views concerning the meaning of these terms.[3] Express and implied trusts are the product of intention. To refer to the above example, the relationship between A and B might have occurred because X transferred property to A to hold on trust for B, or because A had declared that he now holds what was formerly his own property on trust for B. The intention of X in the first instance, or of A in the second, may be clearly stated: for example, X might have said, "I transfer my house, namely, Blackacre, to A to hold it on trust for B"; or A might have used these words, "I declare myself a trustee of my farm, Blackacre, for B".[4] In this form, an express trust is created. On the other hand, the language used may not be clear, and it may be uncertain whether X or A intended only a moral obligation rather than a legal obligation. The court then has to discover their true intention. If it is determined that X or A intended to create a trust, a trust arising by implied intent is said to exist.

---

[1] Maitland (ed. Brunyate), *Equity, A Course of Lectures* (2d ed., 1936), at 44, defines a trust in this way:

> When a person has rights which he is bound to exercise upon behalf of another or for the accomplishment of some particular purpose he is said to have those rights in trust for that other or for that purpose and he is called a trustee.

[2] In some cases, A's only duty is to hold the property for B, handing it over when called upon to do so. In such circumstances, A must not exercise the rights of disposition and of management that would otherwise accompany his having legal title.

[3] See Waters, *Law of Trusts in Canada* (1974), at 17-20.

Trusts created by express or implied intention are not the only ones that may arise. If P transfers property to Q to hold on trust for a certain purpose, and if after that purpose is carried out some property remains over, Q must return the remaining property to P. Q is said to hold on a "resulting trust". A resulting trust also may arise in other circumstances, as for instance where P purchases a house in the name of Q, who has paid no part of the purchase price nor given anything of value for the transfer.[5] Although the authorities are in conflict concerning whether a resulting trust is a product of intention or the imposition of law,[6] the theme of all such situations is that Q must acknowledge the beneficial right of P to the property. By implication P's intention was that Q should hold the remaining property, or the property transferred into Q's name, for P. The trust holds Q to this obligation.

A not unrelated type of trust is the constructive trust. This kind of trust comes into existence when, out of consideration for justice and equity, the law imposes upon one person the obligation to restore or hand over certain property to another. The constructive trust has nothing to do with intention to create a trust; it is machinery that the law utilizes in order to compel one person to recognize the property rights of another.[7]

In modern usage the express trust has been described as fiduciary property management, since the trustee today is often managing an investment, or portfolio of investments, for the beneficiary or beneficiaries. The resulting trust and the constructive trust are more a part of the law of remedies.

Within trusts arising by intention a distinction is made between trusts in favour of persons and purpose trusts. As the name implies, a trust for persons is a trust in favour of a specified person or class of persons: for example, a testator may leave his estate on trust "for my wife, A, for her life, and then to my children equally". On the other hand, the creator of the trust may have no particular person or class of persons in mind, but may want to see his money used to carry out some particular task. For instance, he may leave his estate on trust "for the relief of poverty and distress wherever it exists in Ontario". Trusts of this nature are termed purpose trusts. If the purpose is charitable, as that term is defined by the law, the trust is known as a charitable or public trust, because in principle a purpose can only be charitable if it is for the benefit of the public. However, the purpose may be non-charitable, although it should be noted that few non-charitable purpose trusts are recognized by the law as valid.[8] One difficulty is that an inanimate purpose cannot enforce the trust, while in the last resort the Crown will enforce a charitable trust. Public or charitable trusts are distinguished from other trusts arising by intention; the latter are described as private trusts because they have no public element.

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[4] Under the *Statute of Frauds*, R.S.O. 1980, c. 481, s. 9, these statements would have to be evidenced in writing, since land is involved.

[5] It should be noted that, under s. 11 of the *Family Law Reform Act*, R.S.O. 1980, c. 152, the presumption of advancement between husband and wife in questions of ownership of property is abolished and a presumption of resulting trust applied, subject to certain exceptions.

[6] See, for example, Mowbray (ed.), *Lewin on Trusts* (16th ed., 1964), at 8, and Hayton (ed.), *Underhill's Law relating to Trusts and Trustees* (13th ed., 1979), at 21-23.

[7] English legal texts, for example, Baker and Langan (eds.), *Snell's Principles of Equity* (28th ed., 1982), at 192, sometimes state that "constructive trust" is a term that *expresses* the obligation of the person who must restore or hand over. Other remedies, it is said, bring about the compulsion. The law is obviously developing in this area, and there is room for a difference of opinion whether the constructive trust in Canada is not already a remedy, as opposed to a description of an existing obligation.

Finally, it should be mentioned that trusts may also be created by statute. An example of a statutory trust is the trust created by section 2(1) of the *Estates Administration Act*,[9] whereunder the personal representative of a person dying testate or intestate is declared a trustee of the deceased's assets for the purpose of winding-up that person's estate, and distributing to the entitled beneficiaries the assets remaining after the payment of debts and the discharge of all the deceased's obligations.[10]

2. THE HISTORY OF THE TRUST CONCEPT

The origins of the trust go back many centuries. Even before the Norman Conquest one man might transfer land to another and take a promise from the transferee that the latter would hold the land "to the use of" those persons whom the transferor described. This practice grew throughout the next two centuries; the "use" came to fill an important place in the plans of landowners, because it enabled them to avoid feudal dues (or taxes), to make dispositions of their land to take effect upon their deaths,[11] and to gain a measure of privacy for the way in which they dealt with their own property. However, the common law courts did not recognize the use. Legal title was in the transferee, the feoffee to uses as he was called, and there, for the courts, the matter ended. Should the feoffee renege on his promise to the feoffor and deny enjoyment to the use beneficiaries, neither the feoffor nor the beneficiaries could successfully seek redress in the common law courts.

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[8] Under the *Perpetuities Act*, R.S.O. 1980, c. 374, s. 16(1), a trust for a "specific non-charitable purpose" is to be construed as a power. It is not clear whether this provision is for the purposes of that Act only, or whether it means that in all cases such a purpose is to be construed as a power and, therefore, valid. In *Wood and Whitebread v. The Queen*, [1977] 6 W.W.R. 273 (Alta. S.C., T.D.), at 280, Stevenson L.J.S.C. was of the opinion that its counterpart in the Alberta *Perpetuities Act*, R.S.A. 1980, c. P-4, s. 20(1), was of general application. See, further, *infra*, ch. 8, sec. 2.

[9] R.S.O. 1980, c. 143, formerly *The Devolution of Estates Act*, R.S.O. 1970, c. 129.

[10] The "statutory trusts" created in England by the *Law of Property Act, 1925*, 15 & 16 Geo. 5, c. 20, ss. 34-36 (U.K.), have not been introduced in Canada. In England, tenants in common of land cannot hold their interests as legal estates. Under the provisions of the Act, the legal estate must be held in joint tenancy on trust for joint tenants or tenants in common, whose interests thus become equitable. The object of this "trust for sale", a device widely used in England since the eighteenth century, is to clear the title of these fractional interests, a title now transferable by the trustees alone, and thus to simplify conveyancing. The interests of the tenants are converted into interests in the proceeds of sale.

[11] Although apparently possible at an early stage in the common law, it became established by the end of the thirteenth century that, apart from local customs in particular localities, land could not be devised by will.

In the thirteenth century, appeals were made, from time to time, to the Lord Chancellor to compel the feoffee to uses to honour his promise, and the Chancellor, exercising the Crown's residual justice, would occasionally find it appropriate that the feoffee do so. In the fourteenth century, this enforcement of uses in the Court of the Chancellor, or the Court of Chancery as it came to be known, began to take place with sufficient frequency that it became evident that a new form of property holding was developing. Indeed, between 1400 and 1530 some two-thirds of the work of the Court of Chancery was the enforcement of uses. But this development came abruptly to a halt. As has been noted, uses enabled land owners to avoid feudal dues and, at this time, these dues formed an increasing source of the tax revenue of the Crown. Accordingly, in 1535 the *Statute of Uses*[12] was enacted, which by "executing" the use curtailed drastically the efficacy of this form of land holding. The statute operated in this way. Assume that X conveyed land "to A and his heirs to the use of B and his heirs". Before the *Statute of Uses*, A would hold the legal estate while B would be entitled in equity. After the Statute, the use was "executed": that is, legal title was taken from A and vested in B, much as a modern taxing Act may ignore a trust and tax trust income as if it were the beneficiary's property. However, towards the end of the sixteenth century it became clear that conveyancers would find a means to restore the valuable concept of the fiduciary holding of property to its former vitality.

This was achieved by the creation of two successive uses. If the first use was ineffective, another use was simply imposed upon the first: for example, X would convey land "to A and his heirs to the use of B and his heirs to the use of C and his heirs". The *Statute of Uses* executed the first use and caused legal title to pass from A to B. The common law courts refused to recognize the second use in favour of C and, at common law, B was regarded as alone entitled to the land. In the early seventeenth century, the Court of Chancery, after some hesitation, finally recognized the use upon a use, and protected the interest thereby created in C.[13] To distinguish it from the preceding use, the second use was called a trust, and the modern trust was born. Because the trust, like its predecessor the use, arose through the decisions of the Court of Chancery (often referred to as the Court of Equity), it is sometimes described in the terms originated and employed by equity.[14]

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[12] (1535), 27 Hen. 8, c. 10.

[13] See Mendes da Costa and Balfour, *Property Law* (1982), ch. 19, at 763-85, and Megarry and Wade, *The Law of Real Property* (4th ed., 1975), at 168.

[14] Professors Keeton and Sheridan have described the trust in this manner, a description widely regarded as exact:

> All that can be said of a trust, therefore, is that it is the relationship which arises wherever a person called the trustee is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one [But not a secret trustee: *Re Rees*, [1950] Ch. 204.] and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries or other objects of the trust.

Keeton and Sheridan, *The Law of Trusts* (10th ed., 1974), at 5.

In 1660, the interest of the Crown in the use faded,[15] and the work of the conveyancers proceeded without hindrance. After that date, the Court of Chancery began to develop the law of trusts. Great Chancellors, like Lords Hardwicke, Nottingham, and Eldon, during the period from 1660 to 1830, fashioned through case decisions the basic principles of the trust law that we have today. Throughout the nineteenth century Chancery judges continued the process of refining and honing this branch of the law.

In 1792, the first statute of the first Legislature of the newly-formed Province of Upper Canada provided for the reception of English law.[16] Accordingly, the body of the law of equity, the work of the Court of Chancery that includes trusts, was made applicable, as it then stood, in Ontario. Thereafter, decisions of the Court of Chancery in England were applied by Ontario courts, and the steady and continuous influence of English cases must be acknowledged.[17] However, in 1837, as the population and wealth of Ontario expanded, the Province by statute introduced its own Court of Chancery, which, following the English Chancery organization of the time, possessed a Chancellor and a Vice-Chancellor as judges.[18] This Court made a significant contribution to the law of equity, and Ontario had its own distinguished equity lawyers in the persons of judges such as Chancellor Spragge, and Vice-Chancellors Esten and Strong.[19] The Court of Chancery existed for nearly fifty years,[20] only ending its days in 1881 when, following a similar move in England, the several courts of the Province were combined as divisions of a Supreme Court of Judicature for Ontario.[21]

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[15] By reason of the *Tenures Abolition Act, 1660*, 12 Car. 2, c. 24, the King no longer had any pecuniary interest in the *Statute of Uses*: see Mendes da Costa and Balfour, *supra*, note 13, at 322-23, and Megarry and Wade, *supra*, note 13, at 32-33 and 168.

[16] *An Act to repeal certain parts of an Act passed in the fourteenth year of His Majesty's Reign, intitled, "An Act for making more effectual provision for the Government of the Province of Quebec, in North America", and to introduce the English Law as the Rule of Decision in all matters of Controversy, relative to Property and Civil Rights*, 32 Geo. 3, c. 1. See, now, *Property and Civil Rights Act*, R.S.O. 1980, c. 395. The previous year, the old Province of Quebec was divided into Upper and Lower Canada by order-in-council dated August 24, 1791, which anticipated the coming into force of *An Act to repeal certain Parts of an Act, passed in the fourteenth year of His Majesty's Reign, intitled, "An act for making more effectual Provision for the Government of the Province of Quebec, in North America"; and to make further provision for the Government of the said Province*, 31 Geo. 3, c. 31 (U.K.). In 1840, these Provinces were reunited as one Province under the name of the Province of Canada (3 & 4 Vict., c. 35). Finally, the Province of Canada was divided into the Province of Ontario and the Province of Quebec by s. 6 of the *Constitution Act, 1867* (30 & 31 Vict., c. 3 (U.K.)). For ease of reference "Ontario" will be used to designate the Province after 1791. See, generally, Mendes da Costa and Balfour, *supra*, note 13, at 330-33.

[17] At this time, when there was still a distinct Chancery jurisdiction in England, and no equitable remedies were yet statutorily available in the English common law courts, it must have been singularly difficult for Ontario judges in the King's Bench to handle equitable doctrines. Indeed, from 1794 (the creation of the Court of King's Bench for Upper Canada) to 1837 (the creation of the Court of Chancery), there was no superior court with any equitable jurisdiction: see Rayner and McLaren, *Falconbridge on Mortgages* (4th ed., 1977), at 67-68.

[18] *An Act to Establish a Court of Chancery in this Province* (1837), 7 Will. 4, c. 2. Later, as in England, the number of Vice-Chancellors was increased ultimately to three. For an interesting and informative review of the history in England of the office of Vice-Chancellor, see Megarry, "The Vice-Chancellors" (1982), 98 L. Q. Rev. 370.

[19] Chancellor Spragge, who was appointed from Vice-Chancellor to Chancellor in 1869, was succeeded in the last year of the Court's life by Chancellor Boyd, who held office in the new Chancery Division for many years, and became one of Ontario's most notable judges in the law of equity.

Throughout its many centuries of development, the law of trusts has been almost exclusively judge-made law and, indeed, still looks to the courts for its further growth. Today, only to a limited degree is the law of trusts found in statute.

The role of statute in the law of trusts is a singular one. It was only with the great liberal reforming movement of Victorian England that legislation took place in this area. The thrust of this reform was the abolition of the forms of action and the legal fictions. This movement also swept away the gross technical complexities that had gradually developed around the Court of Chancery. In this process, there were many changes that incidentally affected the law of trusts.[22] However, distinct intervention in the trusts area was limited to legislation that facilitated the more efficient administration of trusts. This legislation was essentially enabling legislation: its provisions would not apply if the creator of the trust wished otherwise, and its concern was principally with the administrative powers and duties of trustees.[23] English Trustee Acts contain little or nothing on the main substantive trust doctrines of equity. The trustee legislation of 1850, 1852, 1859, 1888, 1893, and 1925, to name the principal statutes, each of the last two updating and replacing its predecessor, all bear this character.[24]

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[20] The Court's decisions for the last thirty-two years of its existence (1849-1881) were reported by Alexander Grant, a barrister before the Court, as Grant's Chancery Reports.

[21] *The Ontario Judicature Act, 1881*, 44 Vict., c. 5, s. 3. By this Act, the Supreme Court consisted of two permanent divisions, The High Court of Justice for Ontario and The Court of Appeal for Ontario. The High Court of Justice consisted of three divisions: namely, Queen's Bench Division, Chancery Division, and Common Pleas Division. A fourth division, Exchequer Division of the High Court, was added to The High Court of Justice in 1903 (3 Edw. 7, c. 8, s. 1(3)). The divisions of The High Court of Justice were abolished in 1909 by *The Law Reform Act, 1909*, 9 Edw. 7, c. 28, s. 7(1). Thereafter, the Supreme Court of Ontario was to consist of two branches, The Appellate Division of the Supreme Court of Ontario and The High Court Division of the Supreme Court of Ontario. In 1931 these branches became known as they are today: namely, The Court of Appeal for Ontario and The High Court of Justice for Ontario (S.O. 1931, c. 24, s. 2). Today, the Divisional Court is part of The High Court of Justice for Ontario, having been added in 1970 (S.O. 1970, c. 97, s. 2). See, generally, Mendes da Costa and Balfour, *supra*, note 13, at 779.

[22] See Holdsworth (eds. Goodhart and Hanbury), *A History of English Law* (1965), Vol. XV, at 176 *et seq*.

[23] Holdsworth describes the statutory changes as reforming "the adjective law . . . . On the other hand, the statutory reforms made in the principles and rules of equity are few in number and of minor importance": *ibid.*, at 192-93. Examples of this type of legislation, first introduced in the mid-nineteenth century in England, include the following: *An Act for better securing Trust Funds, and for the Relief of Trustees* (1847), 10 & 11 Vict., c. 96 (U.K.), which enacted enabling provisions concerning trustee administrative powers; *The Law of Property Amendment Act, 1859*, 22 & 23 Vict., c. 35 (U.K.), commonly known as *Lord St. Leonards' Act*, which enacted enabling provisions concerning trustee investment powers; and *An Act to give to Trustees, mortgagees, and others certain Powers now commonly inserted in settlements, mortgages and wills* (1860), 23 & 24 Vict., c. 145 (U.K.), commonly known as *Lord Cranworth's Act, 1860*, which enacted enabling provisions concerning appointment and discharge of trustees.

The English tradition has been followed throughout the Commonwealth. In each of the eleven common law jurisdictions of Canada, in the six states of Australia, and in New Zealand, the local Trustee Act follows, in some instances word for word, the English legislation. When statutory changes have been made in England, similar legislation has traditionally followed a few years later in other Commonwealth jurisdictions. In the last fifteen years, some jurisdictions have reworded, and to a limited degree amended, the English-derived provisions, but otherwise the essential similarity of the law of trusts throughout these Commonwealth jurisdictions has been maintained. Where differences exist, they have been created by the far-reaching property legislation of 1925 in England.[25] Although the *Trustee Act, 1925*[26] and the *Settled Land Act, 1925*[27] were essentially consolidating measures, they do reflect the considerable recasting that took place in that year of the land law of England. This recasting of land law has not generally been followed in Commonwealth jurisdictions, including Ontario and the other common law provinces and territories of Canada. As a result, apart from Manitoba[28] and to a lesser extent Prince Edward Island,[29] the English consolidation of the trustee legislation in 1925 has not been adopted in Canada. An older pattern of English legislation has prevailed, to which occasional provincial amendments have been made, principally in the area of trustees' powers of investment.

Of all the trustee legislation of Commonwealth jurisdictions, the present Ontario *Trustee Act*[30] is perhaps the one that most closely adheres to past English legislation. Paralleling developments in England in the nineteenth century, the Ontario legislature from 1837 onwards enacted a series of reforms of the substantive and procedural law of property, wills, and trusts with the emphasis upon the efficacy of estate administration.[31] In the 1860's, the terms "trust" and "trustees" appeared in the titles of reforming statutes. These provisions, some amended after their original enactment, were consolidated as chapter 107 of the first revision of the Ontario statutes in 1877.[32] Although the present Act reflects at many points the English Trustee Acts of 1888 and 1893, it retains much of the character of the 1877 revision.[33] To this basic form, piecemeal amendments have been made between 1900 and the present day. Perhaps the most striking anachronism of the present Act is that it continues to embrace both Trustee Act provisions and provisions concerned with the administration of deceased persons' estates – an indication of mid-nineteenth century thinking when trusts were almost exclusively perceived as a mode of, and therefore as part of the law of, testamentary disposition.[34]

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[24] *The Trustee Act, 1850*, 13 & 14 Vict., c. 60 (U.K.); *The Trustee Act, 1852*, 15 & 16 Vict., c. 55 (U.K.); *The Law of Property Amendment Act, 1859*, *supra*, note 23; *Trustee Act, 1888*, 51 & 52 Vict., c. 59 (U.K.); *Trustee Act, 1893*, 56 & 57 Vict., c. 53 (U.K.); and *Trustee Act, 1925*, 15 & 16 Geo. 5, c. 19 (U.K.).

[25] *Law of Property Act, 1925*, *supra*, note 10. See, also, Megarry and Wade, *supra*, note 13, at 33-34.

[26] 15 & 16 Geo. 5, c. 19 (U.K.).

[27] 15 & 16 Geo. 5, c. 18 (U.K.).

[28] *The Trustee Act*, R.S.M. 1970, c. T160.

[29] *Trustee Act*, R.S.P.E.I. 1974, c. T-9.

[30] R.S.O. 1980, c. 512.

[31] See, for example, *An Act for the further Amendment of the Law, and the better Advancement of Justice* (1837), 7 Will. 4, c. 3; *An Act to Confer certain Powers on Trustees and Executors* (1868-69), 32 Vict., c. 37; *An Act respecting Remedies for and against executors and administrators and respecting the Limitation of certain actions*, C.S.U.C. 1859, c.78; *An Act to consolidate and amend the Law as to Wills* (1873), 36 Vict., c. 20; and *An Act to provide for allowances to Trustees Executors and Administrators* (1874), 37 Vict., c. 9.

The Ontario *Trustee Act* is concerned with the appointment and discharge of trustees, the investment and administrative powers of trustees, and the remuneration and indemnification of trustees. The Act confers powers upon the Supreme Court of Ontario to make various vesting orders, to appoint and remove trustees where its assistance is needed, to give advice and directions to trustees, and to relieve trustees, where appropriate, of liability for breach of trust. Broadly speaking, apart from the sections on estate administration, these are the contents of the Act. The provisions concerning non-judicial (or private) appointment of trustees, and trustee powers and remuneration, may be excluded or varied by the settlor or testator in the trust instrument, if he so chooses. It is in this latter regard that the Act is intended to be supportive and enabling.

3. THE NEED FOR A REVISED *TRUSTEE ACT*: APPROACHES TO REFORM

(a) THE NEED FOR LEGISLATION

Traditionally, the role of legislation in the trust area has been conceived as supportive of the case law of trusts; that is, as providing better machinery for the administration of trusts than has been, or perhaps could be, provided by the courts through their inductive decisions. To fulfil this role, statutory provisions must be kept abreast of modern needs and trust drafting, and must not be allowed to remain as a response only to yesterday's needs and drafting practices. Should the statute fail to keep pace with the requirements of practice, it will become increasingly of less value to all those concerned with the drafting of trusts. Each trust instrument will be drawn incorporating its own response to contemporary needs, and the statute will become in ever larger measure ignored legislation.

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[32] *An Act respecting Trustees and Executors and the Administration of Estates*, R.S.O. 1877, c. 107.

[33] *An Act respecting Trustees and Executors and the Administration of Estates*, *ibid.*, appeared, subject to amendment, in R.S.O. 1887, c. 110. In R.S.O. 1897, this Act was divided into two parts: namely, *The Trustee Act*, R.S.O. 1897, c. 129, and *The Trustee Investment Act*, R.S.O. 1897, c. 130. In 1911, *The Trustee Act*, 1 Geo. 5, c. 26, consolidated and superseded these latter two 1897 Acts, as well as the following: *An Act to Protect Persons acting as Executors or Administrators*, R.S.O. 1897, c. 131; *An Act respecting the Estates of Insolvent Deceased Persons*, R.S.O. 1897, c. 132; *The Trustee Relief Act*, R.S.O. 1897, c. 336; *An Act respecting Executors and Administrators*, R.S.O. 1897, c. 337, ss. 10-20; *The Surrogate Courts Act*, R.S.O. 1897, c. 59, ss. 63-64; and *The Judicature Act*, R.S.O. 1897, c. 51, s. 39. The 1911 Act appeared, subject to amendment, in R.S.O. 1914, c. 121, and is the form of the *Trustee Act* that has prevailed to the present day.

[34] The statutory lineage of the present Ontario *Trustee Act*, *supra*, note 30, accounts for the fact that trust administration and estate administration are equal concerns of the Act. The fact that executors and administrators are trustees for the purposes of the Act justifies the short title, the *Trustee Act*. There is an overdue need to place the sections of the *Trustee Act* that deal with the administration of deceased persons' estates in a separate new Act, concerned explicitly with that subject. A new *Administration of Estates Act* is the objective of the Commission's current Project on the Administration of Estates of

Unfortunately, this has occurred in Ontario and, for all practical purposes, much of the Ontario *Trustee Act* is obsolete. Therefore, as the present Act no longer performs its traditional role in a meaningful fashion, the fundamental question that the Commission has considered is whether there is a continuing need for legislation in the area of trust law. If there was originally a good case for the enactment of enabling legislation to assist and fulfil the judge-made law, has that reason now disappeared? Many of the Commonwealth common law jurisdictions have thought not. Indeed, in recent years the Trustee Acts of New Zealand,[35] Western Australia,[36] and Queensland[37] have been entirely rewritten to meet modern requirements. The same attitude is reflected in Manitoba where sections taken from the *Trustee Act, 1925*, the contemporary English Act, have been introduced in *The Trustee Act* of that Province.[38]

It may be argued, however, that, if a trust instrument incorporates all the powers and discretions that trustees could ever wish to exercise, there would be no need for the *Trustee Act* as supplementary authority for the exercise of those powers that are in the Act, but not in the trust instrument. Many persons also consider this statutory supplementation cumbersome, particularly for non-professional trustees who may not be familiar with the provisions of the *Trustee Act*. Yet, against this view, it may be asserted that there is still a need for legislation. Statute must, for instance, confer upon the courts the power to advise trustees on the law concerning their instruments, to relieve trustees of liability where breach is excusable, and to make vesting orders. Moreover, no trustee who is discharging his duty of care as a trustee can reasonably afford to be unaware of statutory provisions of this nature.

In addition, the Act can continue to play the role – reflected in English legislation since the mid-nineteenth century and particularly in the English *Trustee Act, 1925* – of enabling legislation, whereby the length of trust instruments may be shortened considerably through the incorporation, by

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Deceased Persons. The new Act would bring together and revise relevant portions of the *Trustee Act*, the *Estates Administration Act*, *supra*, note 9, and the provisions governing practice under the *Surrogate Courts Act*, R.S.O. 1980, c. 491 and Rules, R.R.O. 1980, r. 925, as well as codify and revise a number of the common law doctrines that now govern estate administration.

[35] *Trustee Act 1956*, Repr. Stat. N.Z. 1977, No. 61.

[36] *Trustees Act, 1962*, W. Austl. Acts 1962, No. 78.

[37] *Trusts Act 1973*, Queensl. Stat. 1973, No. 24.

[38] *Supra*, note 28.

reference, of powers and discretions conferred upon trustees by the Act, unless the trust instrument provides to the contrary. Some practitioners are of the view that, while this purpose may have had some validity in days when lengthier instruments were laborious to produce, it has very little significance in the age of the computerized trust document. Yet, the mode of preparation of the document is not the point. Aside from the fact that many offices may not possess word-processing equipment, the trustee will have the benefit of a shorter instrument, and the draftsman, for his part, may be confident that the statutory powers have been designed to be free of the constructional faults that may exist in individually drawn clauses.

However, it may also be argued that, while the adoption by statute of familiar precedents may have had value in the days when the taxing statutes did not impinge so heavily on the drafting of trust instruments, it is doubtful whether general statutory precedents are of widespread value today when instruments must be tailor-made for particular tax situations. Moreover, given the prevailing policy of frequent amendments to the *Income Tax Act* (Canada)[39] it is likely that statutory precedents would soon be rendered otiose. There is force in this argument, but again the sophisticated tax-planned instrument would seem to be a feature of specialized practice. There is no evidence that the types of power contained in modern Trustee Acts will not continue to reflect the powers that appear in the majority of familiar will-forms in this Province. It was essentially for such testamentary trusts that the statutory powers were first introduced.

The Commission has concluded that legislation in the area of trust law is desirable and, indeed, essential. Not only can legislation confer necessary supervisory and remedial powers upon the court, but also, even in a facultative form, it can provide modern provisions for the relatively uncomplicated trust instrument that is drawn in all areas of the Province.

(b) THE FORM OF REVISED LEGISLATION

If it is recognized that legislation in the area of trust law can perform an important and, indeed, necessary function, there arises the question of its form. There would appear to be two basic approaches available. On the one hand, the law of trusts could be codified in statutory form, a response that has support from several jurisdictions in the United States. Alternatively, the traditional role of the *Trustee Act* as supportive and facultative legislation could be continued and the existing Act modernized to accommodate contemporary needs and practice.

(i) Codification

The first possible response would be to codify the law of trusts. The occasion of the Commission's examination of the policy, form, and contents of the Ontario *Trustee Act* would provide an opportunity to determine whether, after a period of development as long as that of *assumpsit* and contract, this area of the law should now be codified.

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[39] *Income Tax Act* (Canada), S.C. 1970-71-72, c. 63.

There is much attraction in this course of action. It is true that equity largely complements and supplements the common law, and is associated today with other areas of law, such as contract, tort, property, and landlord and tenant. However, the trust was wholly a development of equity, and is as self-contained an area of law as, for instance, contract. It is, therefore, as susceptible as contract to possible codification. It is also arguable that the law of trusts is ripe for codification. One hundred and fifty years have passed since the consolidating work of Lord Eldon, who turned equity, including trusts, into a body of law as subject to development solely by *stare decisis* as any branch of the common law, such as contract or tort. The honing of trust law is now sufficiently complete.

This line of reasoning has found acceptance for many years in a number of United States jurisdictions. In Louisiana, codification was unavoidable, given the fact that the common law theory of trusts fitted awkwardly into the civil law. However, because of pressures opposing the introduction of the trust into the State (a civil law jurisdiction in the French tradition), it was not until 1964 that Louisiana adopted a complete code of trust law.[40] It was, therefore, in the common law jurisdictions that codification was first introduced. As the settlement of the United States proceeded, a number of states and territories of the middle and far west, under the influence of David Dudley Field's codification work in New York – completed in 1865, but rejected in his home State[41] – saw codification as an attractive alternative to the unwritten law. The Field codification inspired the contents of the Dakota Territorial Code of 1866[42] and the California Civil Code of 1872.[43] In 1887, Idaho followed suit,[44] as did Montana in 1895.[45]

In this context, the thinking in these jurisdictions differed from that of nineteenth century Europe. In Europe, codification was necessary to introduce, as an entity, a law that was to replace diverse local laws, often conceptually distinct from Roman law. In the jurisdictions of the western United States, it was considered that codification could supply succinctness of expression and convenience of reference to the legal profession and the public alike in developing pioneer jurisdictions with their populations of mixed background. It was a "hip pocket" statement of basic legal principles. Moreover, it provided an opportunity for the codifiers to clarify those many points of law where an inductive, case law jurisdiction is bound to have uncertainty. In the older, developed eastern United States, only Georgia adopted the Field codification.[46] Indiana, which adopted a trust code in 1971,[47] is the latest of the states to codify, although, as in Louisiana, the inspiration for this code is the American *Restatement of the Law of Trusts*, originally adopted by the American Law Institute in 1935, and appearing in its second edition in 1959.

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[40] La. Rev. Stat. Ann. § 9: 1721-2252 (West). For the literature on earlier partial introduction of the trust in 1920 and 1938, and also the 1964 Code, see Report by the Louisiana State Law Institute to Accompany the Proposed Trust Code, La. Rev. Stat., Vol. 3A, at III (West), and Scott, *The Law of Trusts* (3d ed., 1967), Vol. 1, § 1.10, at 29-31.

[41] See Scott, *ibid.*, § 1.10, at 30.

[42] Later to form the code law of North Dakota, N.D. Cent. Code Ann. § 59, and of South Dakota, S.D. Comp. Laws Ann. § 55.

[43] See, now, Cal. Civ. Code §§ 852-71 and 2215-89 (West).

[44] See, now, Idaho Code §§ 15-7-101–15-7-401.

[45] See, now, Mont. Rev. Code Ann. §§ 86-101–86-706. See, also, Oklahoma's Uniform Trust Act, Okla. Stat. Ann. tit. 60 §§ 175.1-175.5, and the Texas Trust Act, Tex. Rev. Civ. Stat. Ann. arts. 7425b-1–7425b-47 (Vernon). The limited early influence of Mexican-Spanish law in California and the south-west United States meant that the civilian pressure for codification was not significant in the states so affected.

(ii) Modernization of Existing Act

The second possible response to the outdated character of much of the existing *Trustee Act* would be to continue, in a revised and updated form, the tradition of enabling and supportive trustee legislation. This tradition can be traced from the statutory revision and consolidation of 1877[48] to the present.

The advantage of this response is that the flexibility and adaptability of the trust concept, springing as these attributes do from the fact that trust law is judge-made law, are retained.[49] Over the five hundred years prior to 1800 when the law of uses, and then of trusts, was being developed by the courts of Equity, only two statutes of any significance contributed to or affected that development: the *Statute of Uses*[50] and the *Statute of Frauds*.[51] The first proved to be the incentive for the creation of the trust out of the ashes of the "passive" use, and the second gave birth to new directions of judicial inventiveness, namely, the constructive trust and the doctrine of fraud prevention epitomized in *Rochefoucauld v. Boustead*.[52] Thereafter, as we have seen, came the nineteenth century reforms, emulated in Ontario, which sought mainly to eliminate the procedural complexity of the past and to play a supportive role to the achievements of the case law.

In the last decade of the nineteenth century the first *Succession Duty Act* was passed in Ontario,[53] while the federal Parliament enacted the first *Income*

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[46] See, now, Ga. Code Ann. § 108.

[47] Ind. Stats. Ann., Code Ed., tit. 30 (Burns). For an interesting study of this codification, and of the questions involved, see Ard, "A Proposed Trust Code for Indiana – An Effort at Reform" (1969-70), 45 Notre Dame Law. 427. See, also, American Law Institute, *Restatement of the Law, Second—Trusts, 2d* (1959), §§ 1-460.

[48] *An Act respecting Trustees and Executors and the Administration of Estates*, *supra*, note 32.

[49] F.W. Maitland in his famous lectures on Equity at Cambridge University, England, at the turn of the century said, "Of all the exploits of Equity the largest and the most important is the invention and development of the Trust. It is an 'institute' of great elasticity and generality; as elastic, as general as contract": *supra*, note 1, at 23.

[50] *Supra*, note 12. Re-enacted in Ontario as *The Statute of Uses*, R.S.O. 1897, c. 331.

[51] (1677), 29 Car. 2, c. 3. In Ontario, see, now, *Statute of Frauds*, R.S.O. 1980, c. 481.

[52] [1897] 1 Ch. 196. See, further, *Lewin on Trusts*, *supra*, note 6, at 24, and Waters, *supra*, note 3, at 192 *et seq*.

[53] *The Succession Duty Act, 1892*, 55 Vict., c. 6.

Tax Act in 1915.[54] By 1945 succession duty, estate tax, and income tax were beginning to make heavy inroads into the wealth of Ontario residents held in trust. Nonetheless, although taxing statutes affect trusts, they do not contribute to the development of the law of trusts. If they contribute at all, it is in the sense only that they lead to a considerable volume of litigation, which has served as the medium for the courts, aside from the provisions of the tax legislation in dispute, to develop the case law of trusts yet further. Today, by far the greatest volume of legislation concerning trusts is contained in the *Income Tax Act*,[55] an Act designed among other things to neutralize the trust so far as possible as a tax avoidance device. Given that the trust, like the use before it, has considerable tax saving potential, and that in the private disposition of wealth a very large number of trusts today have tax saving as their principal purpose, it is not surprising that many think of the tax statutes as laying down the primary law on the subject. It is ironic that this should be so because, for the reasons given above, not only is this a caricature of the true position, but taxing statutes arrived on the scene when the law of trusts was already mature, and have occupied a significant position during only the last thirty or forty years of the trust's three hundred and fifty years of existence and development.

It should be noted that the trust has numerous uses in business and commerce. When one reflects that these sophisticated investment and fiduciary property-holding devices are also subject to the same basic principles of trust law developed by the Equity courts, it is evident that the flexibility and adaptability considered so significant over the years will continue to be relevant. In fact, these characteristics are considered by the business community to be valuable attributes of the trust.

In these circumstances, there is a powerful case for leaving the trust as a creature of case law, to be developed in the future, as in the past, by the courts. The *Trustee Act* would then continue its supportive role, both as to the powers of trustees and of the courts, and would merely be brought to the point where it embodies contemporary needs and practice.

4. CONCLUSIONS

Of the two possible responses – codifying the law of trusts or modernizing the present *Trustee Act* – the Commission prefers the latter.[56] Accordingly, the Commission recommends that the *Trustee Act* should retain its present character as supportive and enabling legislation. The Act should continue to assist and supplement the judge-made law of trusts[57] and to confer powers upon the court. Moreover, the Act should continue to confer powers upon trustees, which, for the most part, should be subject to the contrary intention of the creator of the trust.[58] To accomplish this objective effectively, the Act should be modernized to provide judicial and trustee powers that will accommodate contemporary needs and practice.

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[54] *The Special War Revenue Act, 1915*, 5 Geo. 5, c. 8.

[55] *Supra*, note 39.

[56] One of the Commissioners, the Honourable Richard A. Bell, P.C., Q.C., does not agree with this recommendation. He would have sought to undertake a codification of the law of trusts and believes this is both feasible and preferable.

[57] Draft Bill, s. 3. Section 3 of the Draft Bill provides that, except as otherwise provided in the revised *Trustee Act*, the law respecting trusts and trustees in force in Ontario immediately before the revised Act comes into force continues in force.

Although the primary focus of reform should be to modernize the *Trustee Act*, the Commission also recognizes that there is a need in certain specific areas of trust law for clarification or change. Accordingly, the Commission recommends that, where there appears to be material advantage in accomplishing clarification or change, the revised *Trustee Act* should clarify or amend the existing law, rather than leave the matter to the courts. However, this would be by way of exception to the policy that codification of the law of trusts should not be attempted. The Commission has thought it desirable to reflect its recommendations for modernization, clarification, and change of trust law in legislative form, and has, accordingly, prepared a Draft Bill to revise the *Trustee Act*, which is appended to this Report.[59]

A primary reason for choosing the second response is that the law of trusts is indeed mature and substantially settled, and there would be a danger that, in codifying the law and introducing a new linguistic expression of established rules, questions of statutory interpretation would arise that, without codification, would have been avoided.[60] If there were significant problems, lacunae, and doubts in the case law, there might indeed be a compelling argument for codification, but this is not the situation that exists. In these circumstances, there is every justification for retaining not only the principles and rules of present trust law, but also the flexibility and adaptability that inductive case law has given the trust concept. These merits of the trust concept are so widely recognized, especially in the use of the trust in business and commerce, that it would be unwise in our view to "freeze" the concept in its existing mould. It is true that there could be a gain if, as we have recommended, the *Trustee Act* were to clarify or amend the existing law where that would be advantageous. Similarly, it could be useful if the revised Act were to state the equitable principle or rule where there is now doubt as to the exact nature of the principle or rule. This may well be the case with regard to the three fundamental duties of the trustee: namely, to show the standard of care of the reasonable man; to avoid, and to account for, personal profits received in conflict of interest and duty situations; and to act with an even hand as between successive beneficiaries. But this can be done in an updated *Trustee Act*.

As to the advantage to the profession and the public of having the law of trusts stated succinctly and comprehensively in a single codifying Act, this is an argument for the adoption of codification as a general principle in

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[58] Draft Bill, s. 2(*b*).

[59] See Appendix 1.

[60] Scott, *supra*, note 40, § 1.10, at 30, speaks of the Field Code as "not very satisfactory". He notes that the Code was based in part on the Revised Statutes of New York, 1828, which had "caused a great deal of litigation, and insofar as the code attempted to embody the common law, it is vague, inaccurate and incomplete".

Ontario. Indeed, it is this principle that has been followed, to a greater or lesser extent, in those American jurisdictions that have codified the law of trusts. Not only Louisiana, but other states – California and Indiana, for instance – have reduced a considerable volume of their law to codified form. Whether this principle should be adopted in Ontario is an issue that raises fundamental questions, including cost, that are beyond the ambit of trust law.[61] As far as the availability of information regarding the law is concerned, it should, however, be noted that in Ontario the law of trusts has not been ignored by current works of reference.[62]

An additional reason for the Commission's recommendation to modernize the *Trustee Act*, rather than to codify the law of trusts, is to maintain a very evident Commonwealth tradition of providing an enabling and supportive Act to complement a continued reliance on case law, particularly the persuasive authority of the English decisions. In the United States, the tradition is quite different. Upon attaining political independence in the last quarter of the eighteenth century, the American states began quickly to develop a distinctive body of case law. A century later this fact, combined with the multiplicity of jurisdictions within the United States and the significant size of the American population and wealth, had removed the United States from the path taken by the Commonwealth jurisdictions.

As the law of trusts was already well advanced in 1776, there continues to be a close doctrinal relationship between trusts law in the United States and in the older Commonwealth countries. Nonetheless, the tradition of nineteenth century legislation supportive to the case law was not adopted in United States jurisdictions. As Scott records,[63] legislative intervention, when it came, differed from state to state, and across the country local case law abounded to the point that state codification, together with uniformity legislation and statutory consolidation, was a response to the needs of certainty, standardization, and modernization.[64] As a result, the Canadian courts have looked to England and other Commonwealth jurisdictions, rather than to the

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[61] For a graphic difference of opinion on the value of codification, the labour involved in its production, and its effects, see Hahlo, "Here Lies the Common Law: Rest in Peace" (1967), 30 Modern L. Rev. 241; Gower, "A Comment" (1967), 30 Modern L. Rev. 259; Topping and Vandenlinden, "Ibi Renascit Jus Commune" (1970), 33 Modern L. Rev. 170; and Hahlo, "Codifying the Common Law: Protracted Gestation" (1975), 38 Modern L. Rev. 23.

[62] See Baker (ed.), *Widdifield on Executors' Accounts* (5th ed., 1967), and Waters, *supra*, note 3.

[63] Scott, *supra*, note 40, § 1.11, at 31-33.

[64] Codification should be distinguished from extensive legislation and consolidation in the area of law in question. More numerous than the states that have codified, are the states that have enacted uniform or other legislation in areas of trust law that were in need of reform, and have consolidated their existing legislation, including uniformity legislation: see, for instance, N.Y. Est. Powers & Trusts Law § 17B (McKinney). The Uniform Acts of the National Conference of Commissioners on Uniform State Laws have been widely adopted, either in their recommended, or in an amended, form. An example of recent codification, which still has significant elements of consolidation about it, is the Probate, Estates and Fiduciaries Code in Pennsylvania, Pa. Stat. Ann. tit. 20, §§ 101-8815, enacted by Pa. Laws 1972, c. 164. By that law, the former title 20, known as the "Consolidated Pennsylvania Statutes", was amended to read as the above "Code".

United States, for persuasive authority in the area of trust law. The Commission is of the view that, given the Commonwealth tradition of a shared body of case law and enabling and supportive Trustee Acts, which is well known and understood in the Province, the case for a departure from this tradition is not sufficiently persuasive.[65]

One final point should be mentioned. If the *Trustee Act* is to be retained, its supportive role continued, but its provisions modernized, there is a question concerning which types of trust it should seek to support. The *Trustee Act, 1925* in England, like its predecessors, is concerned primarily with the trust that a person might create in his will or set up by deed in his lifetime in order to transfer his property to others, normally as successive beneficiaries. Those persons will probably be his spouse, his children and grandchildren, and his relations or friends. On the other hand, he may wish to support one or more charitable organizations, such as his place of worship, and these gifts, too, may find their way into his testamentary or *inter vivos* trust.

However, these are not the only types of trust that may be created. As has been said, the trust has played a considerable role in business and commerce since the early investment trusts of the late eighteenth century, and it is essentially here that the flexibility and adaptability of the trust have been demonstrated. A company may have a "trusteed" pension plan, which is essentially an investment trust of the contributions that it receives, usually from both the employee and the employer. Company profit sharing trusts and stock purchase agreements are other forms of provision for an employee. Registered retirement savings plans administered by trust companies are not infrequent. A partner or director/shareholder may insure his co-partners' or co-shareholders' lives to the value of their several interests, and the insurance policy may be held by a trustee. A shareholder may agree that his voting rights should be subject to a voting trust.

The trust is also used as a substitute for incorporation, especially for real estate holding and development. The modern investment or unit trust, of which the "REIT" (real estate investment trust) is a prime example, is a revival of the management or investment trust idea of the late eighteenth and nineteenth centuries. The syndicate trust is a pre-incorporation security device. Indeed, security provision is an important role of the trust. Apart from its statutory employment in bankruptcy, its best known form is the trust for bondholders when a company has issued debentures and puts up its assets as security. The assets are vested in a trustee. Security is also the basis of stock escrow trusts, trusts of warehouse receipts, and equipment trusts.[66]

The very diversity of these business and commercial trusts suggests that they cannot be brought within the confines of the *Trustee Act*, even though the law of trusts as established by the cases applies to these trusts as well as to private individuals' trusts. It is interesting to observe that the Indiana Trust

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[65] See, however, the comments of the Honourable Richard A. Bell, P.C., Q.C., Commissioner, *supra*, note 56.

[66] For further explanation of contemporary personal, business, and commercial trusts, see Waters, *supra*, note 3, ch. 12.

Code[67] and the New York Estates, Powers and Trusts Law[68] do not incorporate provisions for such trusts. In Canada, trusteeship in bankruptcy is covered totally by the federal *Bankruptcy Act*,[69] trusts for bondholders by the *Business Corporations Act, 1982*,[70] and pension fund trusts by the *Pension Benefits Act*.[71] Such trusts, therefore, have their own location in various statutes, and it would be logical for further provisions to be placed in their respective Acts. In these circumstances, the Commission recommends that the revised *Trustee Act* should not apply to business, commercial or investment trusts, including, for example, pension trusts, employee benefit and profit sharing trusts, retirement savings plans, home ownership savings plans, retirement income funds or any other savings plan trust registered under the *Income Tax Act* (Canada), trusts further to a buy-sell agreement, stock purchase agreement trusts, corporate bond trusts, and voting trusts. However, a trust should not be excluded from the revised Act merely because it involves, in whole or in part, the carrying on of a business.[72]

Similarly, the Commission is of the view that the provisions of the revised *Trustee Act* should not apply generally to charitable trusts and non-charitable purpose trusts. These types of trust are governed, at present, by a unique body of case law[73] and diverse statutory provisions,[74] which should be examined *in toto* before reform of this area of the law is undertaken.[75] However, the Commission has concluded that the revised Act can usefully provide guidance in two areas where difficulties appear to have arisen, without impeding eventual reform of the law of charities: namely, the variation of charitable trusts and the remedying of trust provisions that contain both charitable and non-charitable purposes. Accordingly, the Commission recommends that, until the topic of charity law reform has been examined in detail, the revised *Trustee Act* should not apply to charitable trusts or non-charitable purpose trusts,[76] except to provide specific provisions for the variation of charitable trusts and the remedying of trust provisions that contain both charitable and non-charitable purposes.[77]

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[67] *Supra*, note 47.

[68] *Supra*, note 64.

[69] R.S.C. 1970, c. B-3.

[70] S.O. 1982, c. 4, ss. 46-52.

[71] R.S.O. 1980, c. 373. The Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829, an American federal Act, is so complete a provision concerning pension plan fiduciaries that it has been described as the "Federal Law of Trusts".

[72] Draft Bill, s. 1(*p*)(iii).

[73] See Waters, *supra*, note 3, ch. 14.

[74] For example, trusts for the upkeep of graves and tombs are within the provisions of the *Cemeteries Act*, R.S.O. 1980, c. 59. Some provision is made for charitable trusts under the terms of the *Charitable Gifts Act*, R.S.O. 1980, c. 63, and the *Charities Accounting Act*, R.S.O. 1980, c. 65, as amended.

[75] See, for example, Cullity, "Statutory Machinery for Supervising Charities" (1972), 1 The Philanthropist 22.

[76] Draft Bill, s. 1(*p*)(i).

[77] See *infra*, ch. 8, and Draft Bill, Part VIII.

Generally speaking, subject to the two abovementioned exceptions,[78] the revised *Trustee Act* is designed to apply to all trusts however created and to all trustees however appointed.[79] Nonetheless, with respect to certain proposed provisions, it will be recommended, for reasons to be discussed in later chapters, that these provisions should only apply, for example, to express trusts and not to resulting or constructive trusts.

In addition, it is intended that the revised *Trustee Act* should apply to all trusts whenever created and to all trustees whenever appointed.[80] Nonetheless, in certain instances, the nature of the change in the present law that the Commission will propose is such that special transitional provisions will be recommended; for example, that the proposed provision should only apply to trust instruments that take effect after the revised Act comes into force.

The chapters of this Report that follow will deal with the present Ontario *Trustee Act* and, in particular, with those aspects of trust law that the Commission considers to be in need of revision, clarification, or change. The order of the chapters follows, for the most part, the order in which the provisions of the Draft Bill appear.

RECOMMENDATIONS

The Commission makes the following recommendations:

1. The *Trustee Act* should retain its present character as supportive and enabling legislation: the Act should continue to assist and supplement the judge-made law of trusts and to confer powers upon the court and also upon trustees, subject to the contrary intention of the creator of the trust.

2. The *Trustee Act* should be modernized to provide judicial and trustee powers that will accommodate contemporary needs and practice.

*3. Where there appears to be material advantage in accomplishing clarification or change, the revised *Trustee Act* should clarify or amend the existing law, rather than leave the matter to the courts. However, this would be by way of exception to the policy that codification of the law of trusts should not be attempted.

4. The revised *Trustee Act* should not apply to business, commercial or investment trusts, including, for example, pension trusts, employee benefit and profit sharing trusts, retirement savings plans, home ownership

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[78] A third exception, carried over from the present *Trustee Act*, is that the revised *Trustee Act* should not apply to an estate conveyed by way of mortgage: see *Trustee Act*, *supra*, note 30, s. 1(*q*), and Draft Bill, s. 1(*p*)(ii).

[79] Draft Bill, s. 2(*a*).

[80] *Ibid.*

* See, however, the comments of the Honourable Richard A. Bell, P.C., Q.C., Commissioner, *supra*, note 56.

savings plans, retirement income funds or any other savings plan trust registered under the *Income Tax Act* (Canada), trusts further to a buy-sell agreement, stock purchase agreement trusts, corporate bond trusts, and voting trusts. However, a trust should not be excluded from the revised Act merely because it involves, in whole or in part, the carrying on of a business.

5. Pending an examination of charity law reform generally, the revised *Trustee Act* should not apply to charitable trusts or non-charitable purpose trusts, except to provide specific provisions for the variation of charitable trusts and the remedying of trust provisions that contain both charitable and non-charitable purposes.

6. Subject to Recommendations 4 and 5, and to certain exceptions related to specific proposed provisions, the revised *Trustee Act* should apply to all trusts however created and to all trustees however appointed.

7. The revised *Trustee Act* should apply to all trusts whenever created and to all trustees whenever appointed, except in certain specific instances where the nature of the change in the present law that the Commission will propose necessitates a special transitional provision.

CHAPTER 2

GENERAL PRINCIPLES GOVERNING THE EXERCISE OF POWER AND DISCHARGE OF DUTY BY TRUSTEES

1. INTRODUCTION

In the course of administration of a trust, a trustee has to discharge the duties set out for him in the trust instrument or, if there is no instrument, in the oral trust terms. For this purpose, the trustee has to make decisions and often choose between various possible courses of action. It is to enable the trustee to carry out these duties that he has powers, both administrative and dispositive. However, over and above the duties that are imposed and the powers that are conferred upon a trustee by the trust instrument or by statute, he has certain basic duties that govern him in all his actions. These duties arise from the nature of the trustee's office. A trustee is a fiduciary. This means that he is entrusted with title to and control over another person's property for the exclusive purpose of serving that other person.[1] Because of the trust that is reposed in him through the act of assuming the office, the trustee promises to perform his tasks personally, with care, and with the sole interests of the beneficiaries in mind.

The basic duties of a trustee are therefore threefold. First, a trustee must carry out his task with due care and attention, as well as honestly. Secondly, a trustee must not delegate to another the responsibilities entrusted to him. Thirdly, a trustee must not permit his own interest to conflict in any way with his duty to the beneficiary whom he serves.

There is a wide range of persons, such as solicitors, accountants, and brokers, who must observe these fiduciary duties, but none must do so as intensely as a trustee. This is partly due to historical factors,[2] but also because the essence of the trusteeship task, from beginning to end, is indeed one of trust. Opportunities for abuse of the office are plentiful, whether by retaining the office but passing over the task of performing the duties of it to others, by dishonesty through self-seeking in one manner or another, or by mere neglect. Because title to the property being administered is in the trustee's own name, and he is usually empowered to buy, sell, transfer, and charge trust property, his personal involvement, skill, and integrity are of paramount importance to the beneficiary.

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[1] See Waters, *Law of Trusts in Canada* (1974), at 31-34.

[2] The concept of ownership through trusteeship was fashioned in the English Court of Chancery. Solicitors, accountants, and brokers are persons practising particular professions whose activities require of them some of the behaviour required of a trustee.

It is for these reasons that, since the latter half of the seventeenth century, when the modern law of trusts began to be fashioned in the English courts, the three basic duties have been emphasized constantly by the courts of all jurisdictions in which the trust is known. These duties are discussed at length in texts on the law of trusts.[3] While it is not our purpose to attempt a codification of the law of trusts, we have considered whether a revised *Trustee Act* might usefully reiterate any aspect of these basic duties, and, in so doing, clarify the case law in any respect or develop principles already established. In addition to an examination of the three fundamental duties mentioned above, we shall discuss in this chapter two other general principles that govern the exercise of power and discharge of duty by trustees, namely, that trustees must act unanimously and that the powers of trustees are solely theirs.

2. TRUSTEES' DUTY OF CARE

(a) The Basic Duty of Care

In conducting the management of the trust, the trustee must exhibit the same diligence and care that an ordinary prudent man of business would exercise in conducting a business that is his own.[4] Whatever he is doing on behalf of the trust, and in the discharge of his duties, including the exercise of any dispositive or administrative powers, what is required of him, as Dickson J. has stated, is "vigilance, prudence and sagacity".[5] Such a duty condemns negligent omission, as well as commission, and is allied with the equally important duty of the trustee to act in good faith. Although difficult to define, good faith may be said to mean an honest belief on the part of the trustee that what he has done, or proposes to do, is proper and appropriate.[6] The duty of care complements the primary duty to act in good faith. If either duty is breached, and loss ensues to the trust or to a beneficiary, the trustee is in breach of trust, and he must personally make good the loss. However, his lack of good faith or of care must be established as the cause of the loss. As Lindley L.J. once remarked, "a trustee is not a surety, nor is he an insurer; he is only liable for some wrong done by himself, and loss of trust money is not per se proof of such wrong".[7]

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[3] See, for example, Mowbray (ed.), *Lewin on Trusts* (16th ed., 1964), ch. 9; Hayton (ed.), *Underhill's Law relating to Trusts and Trustees* (13th ed., 1979), ch. 11; and Waters, *supra*, note 1, ch. 18.

[4] For a general discussion of the trustee's standard of care, see Waters, *supra*, note 1, at 655-61.

[5] *Fales, Wohlleben v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302, at 318, (1977), 70 D.L.R. (3d) 257, at 270, [1976] 6 W.W.R. 10, at 22 (S.C.C.) (subsequent references are to 70 D.L.R. (3d)).

[6] See further, Cullity, "Judicial Control of Trustees' Discretions" (1975), 25 U. Toronto L.J. 99.

As a result of some *dicta* of Jessel M.R. in *Re Speight*[8] in the English Court of Appeal in 1883, the thought was encouraged that, if a trustee had been honest and had done his best to further the interests of the beneficiaries, he should not be expected to do more. Honest belief that one's actions are proper is, however, a subjective assessment of trustee conduct, and was clearly rejected by three leading House of Lords cases between 1887 and 1889.[9] As a result of these decisions, the relevant question is whether a trustee has acted with integrity in what he did, seeking to do what the task demanded; the standard of care expected of him is an objective one, external, that is, to any consideration of the skills or circumstances of the particular trustee whose conduct is impugned. The test is what would have been done by that familiar legal creature, the *reasonable man*. In the law of torts, he has traditionally been known as the man on the Clapham omnibus; in the law of trusts he is the *ordinary prudent man of business*. The particular trustee must act as this man would act in the same circumstances. If this standard is not satisfied, and loss ensues, then the trustee is in breach of trust and responsible.

Despite some ambiguous remarks by Middleton J. in *Davies v. Nelson*,[10] it has remained unchallenged in Ontario, as elsewhere, that equity is concerned neither with the level of skill of the impugned trustee, nor with the manner in which he conducts his own affairs. A trustee is in breach of trust if he fails to demonstrate the level of skill, caution, and active involvement of the ordinary prudent man of business conducting his own affairs. In putting it this way, the courts assume that the prudent man will be most conscientious and diligent when looking after his own interests. Indeed, it is to remove any doubt whatsoever that some English and American courts have preferred to emphasize the moral responsibility of trusteeship, and to say that the care required is that which the ordinary prudent man of business would show in managing the affairs of others.[11] It is this emphasis that we prefer to employ in describing the care and attention required of the trustee in the discharge of his duties and the exercise of his powers.[12]

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[7] *Re Chapman*, [1896] 2 Ch. 763 (C.A.), at 775.

[8] *Re Speight* (1883), 22 Ch. D. 727 (C.A.), at 746. The decision of the Court of Appeal was reversed, however, *sub nom. Speight v. Gaunt* (1884), 9 A.C. 1 (H.L.).

[9] *Learoyd v. Whiteley* (1887), 12 A.C. 727 (H.L.), aff'g (1886), 33 Ch. D. 347 (C.A.); *Knox v. Mackinnon* (1888), 13 A.C. 753 (H.L.); and *Rae v. Meek* (1889), 14 A.C. 558 (H.L.).

[10] (1928), 61 O.L.R. 457, at 463, [1928] 1 D.L.R. 254, at 257 (C.A.). For an examination of the case law in Ontario and in other jurisdictions on the standard of care, see Waters, *supra*, note 1, at 656-58, and 685-87.

[11] See *Re Whiteley* (1886), 33 Ch. D. 347 (C.A.), at 355, *per* Lindley L.J., and *King v. Talbot*, 40 N.Y. 76 (Ct. App. 1869). See, also, Waters, *supra*, note 1, at 685-87. The distinction between a "prudent man" and a "prudent trustee" formulation of the duty of care is most often discussed in the context of the investment power conferred upon trustees. For a further discussion of this topic, see, *infra*, ch. 4, sec. 2(c).

Given this preference of expression by the Commission, the question that we have asked ourselves at this juncture is whether the common law rule prescribing the duty of care of a trustee should now be made statutory. The argument against such a proposal is essentially twofold. First, English trustee legislation since its inception in the nineteenth century has been concerned solely to facilitate the administration of trusts, and trustee legislation throughout the Commonwealth has adopted and retained that tradition. Trustee legislation has always been enabling in character, even within the confines of trust administration, and, accordingly, the general law of trusts remains the product of case law, evolving by measured step from generation to generation. A trustee will discover in *Halsbury's Laws of England*,[13] or in any of the legal texts on the law of trusts, the duties that attach to his office, as those duties have been elucidated by the courts. Statutory intervention, it is said, is not needed; the courts have satisfactorily fashioned the trustee duties, and the commentators have provided information, synthesis, and analysis of that case law.

The second aspect of the argument is that, since it is not proposed that the rule be changed in any significant manner, a formulation having the binding force of statute would merely unsettle the case law. The courts would be bound in future to be concerned with the process of statutory interpretation rather than with the interpretation and application of case law. Attention has been drawn to the fact that codifications in the United States are evidence enough that broad statements of case law principle add nothing, and that detailed language necessitates precise analysis of the meaning of particular words in the context of statutory sentences.

The argument on the other hand for the introduction in the revised *Trustee Act* of a statutory formulation of the rule is simple. The rule is fundamental, and it is vital that all accepting the office of trustee should realize that the rule exists. Moreover, because, as we have noted, there are different formulations of the standard of care, it may be asserted that there is advantage in setting forth one statement of the standard in the revised *Trustee Act*. In so doing, the nature of the obligation that should be imposed upon trustees in the discharge of their duties and exercise of their powers would be placed beyond peradventure, namely, that the care required by trustees is that which the ordinary prudent man of business would show in managing the affairs of others.

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[12] In Canada, for a similar expression of the duty of care in the context of trustee investment powers, see Uniform Trustee Act, Conference of Commissioners on Uniformity of Legislation in Canada, Proceedings of the Fifty-Second Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1970), at 35 and 115-17. In addition, see Manitoba Law Reform Commission, *Report on Investment Provisions of "The Trustee Act"* (Report No. 50, February 12, 1982), and *An Act to Amend The Trustee Act*, S.M. 1982-83, c. 38, s. 5. See, also, *infra*, ch. 4, sec. 2(c)(ii)b. In the United States, see the National Conference of Commissioners on Uniform State Laws, Uniform Probate Code, Uniform Laws Ann., *Estate, Probate and Related Laws* (1972), Vol. 8, § 7-302, at 584, for a like expression of the duty of care in a general context. See, also, *infra*, this ch., sec. 2(c).

[13] Simonds (ed.), *Halsbury's Laws of England* (3d ed., 1962), vol. 38.

We are persuaded by this latter argument. Although we do not think codification of the law of trusts is in general either necessary or desirable in Ontario,[14] it is arguable that, despite the possible hazards of codifying the rule, the risk should be taken with a rule that is so fundamental as this one. By codifying the case law rule, the revised *Trustee Act* would emphasize the importance that the law attaches to the duty of care. Accordingly, we propose the incorporation in the revised *Trustee Act* of the standard of care that is reflected by the "prudent trustee" formulation. The Commission recommends that the revised *Trustee Act* should contain a provision to the effect that, in the discharge of their duties and the exercise of their powers, whether the duty or power is created by law or the trust instrument, trustees shall exercise that degree of care, diligence, and skill that a person of ordinary prudence would exercise in dealing with the property of another person.[15]

Against this background of the general duty of care, we now turn to examine two types of trustee, namely, the non-professional, unremunerated trustee and the professional trustee. The issue is whether any aspect of the general duty of care, as just recommended, should be varied depending upon the type of trustee involved with the exercise of powers and the performance of duties of the trust.

(b) THE NON-PROFESSIONAL, UNREMUNERATED TRUSTEE

Many trusts in favour of a spouse, children, or grandchildren, that is, family trusts, are subject to the trusteeship of members of the family. Particularly is this so where the trust is testamentary. The trustees are likely to be the spouse-beneficiary, and brothers or sisters of the settlor or testator. Sometimes, if a child is of age, he or she will be named a trustee, probably in addition to the spouse or the child's aunt or uncle. The question arises whether the standard of care expected of the ordinary prudent man of business is a realistic or fair standard to impose upon persons who may have no business experience, or very little such experience, who perhaps have never acted as an executor or trustee, and who undertake trusteeship gratuitously out of loyalty or affection for the creator of the trust and his family.

That the relative experience of trustees may be a factor to be considered in the conduct of trust affairs is evidenced by two recent cases, *Fales, Wohlleben v. Canada Permanent Trust Co.*,[16] a decision of the Supreme Court of Canada, and *MacDonald v. Hauer*,[17] a decision of the Saskatchewan

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[14] One of the Commissioners, the Honourable Richard A. Bell, P.C., Q.C., does not agree with this view. He would have sought to undertake a codification of the law of trusts and believes this is both feasible and preferable: see *supra*, ch. 1, note 56.

[15] Draft Bill, s. 4(1).

[16] *Supra*, note 5.

[17] (1976), 72 D.L.R. (3d) 110, [1977] 1 W.W.R. 51 (Sask. C.A.). See, also, Waters, "Liability Between Co-Trustees – Another Contest: MacDonald v. Hauer" (1977-78), 4 Estates and Trusts Q. 12.

Court of Appeal, each of which dealt with the judicial power to excuse trustees for breach of trust. In the former case, the Court noted that on the testator's death his widow – the co-trustee and a beneficiary – was left as a housewife with four children to raise, that she took a night school course on "How to Invest your Money", and generally tried her best. The Court relieved her totally of any liability for the breach of trust committed by her co-trustee, a trust company, and herself. In the latter decision, the widow, a co-trustee, knew nothing about business and took no part in the affairs of the trust. On the death of her husband, the creator of the testamentary trust, she left her hometown, Saskatoon, to stay with relatives in England and then in Toronto. It was presumably her supposition that the family solicitor and her sons, also trustees, would continue to look after the estate affairs. Both the court of first instance and the Saskatchewan Court of Appeal said that the court would have exercised the excusing power in her favour had the need arisen. No doubt because the statutory language did not require it, the courts in *MacDonald v. Hauer* did not allude to whether the widow's conduct actually constituted a breach of trust on her part.

If the courts are prepared to exercise their power to excuse trustees for breach of trust in these circumstances, would it not be better to take the whole matter out of the realm of judicial discretion – where each case, as a decision on the facts, lends nothing to legal precedent – and for the revised *Trustee Act* to make express provision for a lower standard of care for non-professional, unremunerated trustees? Settlors and testators would be on notice before their trust instruments are drafted concerning all that is expected by the law of non-professional trustees, especially if those trustees seek no remuneration. Professional co-trustees, or other remunerated trustees, would also know before assuming office what risk they run as a co-trustee of being held solely responsible for loss consequent upon breach.

Indeed, the present formulation of the standard of care expected of trustees is thought, by some, to be sufficiently flexible to enable the courts to consider the knowledge and skill of the particular trustee, although applying an objective test. Would the ordinary prudent man, with this knowledge and this level of skill, have done as this trustee did? Although we do not consider this a correct view of the law – the knowledge in the circumstances that the prudent man of business could be expected to have, and that level of skill, are also required – we think it underlines the doubt that can exist concerning the position of the less knowledgeable and less skilled person who accepts trusteeship. Nonetheless, any standard of care that is lower than that of the ordinary prudent man of business would, in all probability, assume some overtly subjective character. It would presumably be required of the trustee, who accepts the office out of family affection and acts gratuitously, that he act with the care, skill, and caution that he brings to the management of his own affairs.

We have had little difficulty in deciding that the emergence of a subjective standard of care, which is really no standard at all, is not desirable. A trustee is a fiduciary. With extensive authority, acting on his own decisions, to commit the trust property in a variety of ways, and with power to bind the trust beneficiaries, the trustee must be expected to act as would the prudent man of business, as well as to be loyal and actively involved in decision making. Fiduciary administration, whether of considerable or small amounts of property, would be gravely impaired if anything less than the objective test of the prudent man of business were applied. Expert assistance is available to the non-professional trustee, and, if he is not able to make a reasonable assessment of the advice he receives, it is arguable that he should not be acting as trustee, or at least assuming those duties that he cannot discharge properly. Nor can it be presumed that the settlor or testator, by appointing those whom he wishes to act, has accepted each appointee with all his limitations. Even if the creator of a trust does accept that his original appointee has limitations, a lower standard of care for non-professional, unremunerated trustees would also apply to successor trustees, probably appointed by others, and possibly unknown to the settlor or testator.

We therefore do not recommend any lowering of the prudent man of business standard. Although the discretionary power of the court to excuse a trustee for breach of trust may not be an ideal instrument with which to handle those situations of breach where there are mitigating circumstances involving a lack of relative knowledge and skill, it does afford a means of dealing equitably with such cases without the law condoning a generalized lower standard of care for trustee conduct. Accordingly, we recommend that non-professional, unremunerated trustees should not be governed by any lower standard of care than that recommended previously.[18] In the discharge of their duties and the exercise of their powers, therefore, all trustees would be required to exercise that degree of care, diligence, and skill that a person of ordinary prudence would exercise in dealing with the property of another person.[19]

(c) THE PROFESSIONAL TRUSTEE

Once a trustee accepts remuneration, whether or not he actually possesses the skill and prudence of the ordinary prudent man of business, there can surely be no question that he ought to be subject to the prudent man standard of conduct. He is being paid for his services and, accordingly, has allowed the matter to be placed on a business basis.

However, where a trustee is a professional, not only is he, or the trust company, remunerated at current rates, but he holds himself out to the public as having particular skills to carry out estate and trust administration. A lawyer, an accountant, or an individual such as an investment authority has a skill or, because of his particular profession, is assumed by the public to have such a skill. A trust company not only has a range of technical services available to it, but it also advertises its expertise in journals and brochures. If a trustee possesses the skills of a professional, or holds himself out as having such skills, should he be held only to the same standard of care as that which is expected of the well-meaning relative?

The response of the American Law Institute to this question is that, where a trustee "has or procures his appointment as trustee by representing that he has greater skill than that of a man of ordinary prudence, he is under a duty to exercise such skill".[20] However, the Institute envisages that the settlor or testator may wish to relax or modify that higher standard of care. Provided that the trustee is not exonerated by an express clause in the trust instrument from liability for a "breach of trust committed in bad faith or intentionally or with reckless indifference to the interest of the beneficiary", or for "any profit which the trustee has derived from a breach of trust", and provided that the exoneration clause has not been inserted "as the result of an abuse by the trustee of a fiduciary or confidential relationship" between the trustee and the creator of the trust, the Restatement would give full force to an express alteration of the higher standard of care.[21] This approach has been adopted by a number of American state courts.[22]

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[18] See *supra*, this ch., sec. 2(a).

[19] Draft Bill, s. 4(1).

In 1969, the National Conference of Commissioners on Uniform State Laws, together with the American Bar Association, approved the Uniform Probate Code,[23] which also incorporates the higher standard of care. Section 7-302 states as follows:[24]

> 7—302. Except as otherwise provided by the terms of the trust, the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another, and if the trustee has special skills or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills.

However, as in the Restatement, the higher standard of care for those trustees possessing special skills or expertise is not made mandatory by the Uniform Probate Code, but is subject to the express terms of the trust instrument. Given the ability of the institutions discharging estates and trusts work to insist on the incorporation in trust instruments of such exculpatory clauses before they will accept trusteeship, it is difficult to determine what impact the Restatement and the Uniform Probate Code have had in those states that have adopted these provisions.[25]

The case law position in the United States is somewhat equivocal.[26] Inspired by the Restatement, many courts of first instance and some state appellate courts have stated in actions against trust corporations that those who have or represent themselves as having special skills must be held to that standard of care. One of the latest examples of such an instance is *Re Estate of Killey*,[27] where the Supreme Court of Pennsylvania decided without hesitation that the trust corporation was subject to the higher standard of care, and remitted the case to the trial court to determine whether the trust corporation's conduct had conformed to the skills that it had or had represented itself to have. On the other hand, some courts, although hearing actions against trust corporations, have made no reference to a higher standard of care. Appeal courts have sometimes ignored the issue, despite the fact that the judgment of the trial court spoke emphatically and at length on the matter.[28] These appellate courts have approached the litigation at hand simply on the basis of whether the professional trustee in question was acting with both good faith and prudence. Indeed, such instances suggest, particularly where the appellate court has upheld the judgment of the lower court, that the language of a higher standard is employed by the court to underline that the professional trustee is rightly held to have acted in breach; "any trustee would be held in breach for this conduct, and this trustee is a professional".[29]

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[20] American Law Institute, *Restatement of the Law, Second – Trusts, 2d* (1959), § 174, at 379.

[21] *Ibid.*, § 222, at 516-17.

[22] See Scott, *The Law of Trusts* (3d ed., 1967), § 174.1, at 1412-15.

[23] Uniform Probate Code, *supra*, note 12.

[24] "This is a new general provision designed to make clear the standard of skill expected from trustees both individual and corporate, nonprofessional and professional": Uniform Probate Code, *ibid.*, at 584.

[25] Concerning the adoption of the Restatement, see *supra*, note 22. As of January, 1982, 15 states had adopted the Uniform Probate Code, namely, Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Kentucky, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, and Utah: see Uniform Laws Ann., *supra*, note 12 (Cum. Supp., 1982), Vol. 8, at 176.

[26] Scott, *supra*, note 22, § 174, at 1411, remarks on the higher standard of care expected of professionals: "There seem to be no cases squarely holding that this principle is applicable to trustees, but there is no apparent reason why it should not be applicable to them." See, also, Bogert, *The Law of Trusts and Trustees* (2d ed., 1965), § 541, at 151-74.

In examining the merits of the issue whether professionals should be subject to a higher standard of care than non-expert trustees, it must be recalled that the statutory judicial power to excuse trustees for breach of trust, common to England, Scotland, Northern Ireland, New Zealand, and throughout the Canadian and Australian jurisdictions, is unknown in the United States. The Commonwealth tradition is to retain one uniform standard of care, namely, that of the prudent man of business, and to give the courts a discretion to relieve a trustee, wholly or partly, of liability for the breach or possible breach he has committed. In this way, the courts are free to expect more of the professional trustee than they might expect of the non-professional, and they have in fact done so. It has not been easy for professional trustees to seek successfully the clemency of the courts. In *Fales, Wohlleben v. Canada Permanent Trust Co.*,[30] the Supreme Court of Canada thought fit, in the circumstances of that case, to excuse the non-professional trustee completely, and to refuse any such relief to the professional co-trustee, a trust company.

In the United States, however, where the influence of English statute and case law has not been felt, breach of trust, so found, is automatically followed by the liability consequences. The absence of a statutory judicial excusing power has instead led naturally to the idea that different standards of care should be imposed upon persons and trust institutions with different levels of skill. Interestingly enough, it has not been suggested that a trustee should be subject to a standard less than that of the objective test of the prudent man of business; rather, there has emerged a call for greater care from professionals.

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[27] *Re Estate of Killey*, 326 A.2d 372 (Pa. S.C. 1974).

[28] See *Re Cross' Estate*, 172 A. 212, rev'd 176 A. 101 (N.J. Prerog. Ct. 1935). See, also, *Re Clark's Will*, 242 N.Y. Supp. 210, rev'd 177 N.E. 397 (N.Y. Ct. App. 1931).

[29] On the American case law with regard to the higher standard of care, see, generally, Note, "Standards of Care for Corporate Trustees" (1948-49), 16 U. Chi. L. Rev. 579, and Berliant, "Standard of Care for Corporate and Professional Trustees" (1956), 42 Va. L. Rev. 665.

[30] *Supra*, note 5.

The primary issue that must be addressed is whether Ontario should impose upon professional trustees a higher standard of care than that of the ordinary prudent man of business. The related issue of whether the statutory judicial excusing power should be retained will be discussed in the next section of this chapter.

The argument for change in Ontario – that is, for the adoption of a higher standard for professionals and the retention of the standard of the ordinary prudent man of business for non-professionals – is essentially based on the observation that the law already recognizes the principle that more is expected of those who have, or hold themselves out as having, special skills than is expected of others performing the same task. Both in the law of agency[31] and in the law of torts[32] this dichotomy is established and well understood. Why, it is said, should the law of trusts not recognize the same principle? The American Restatement of the Law of Trusts has made this the central justification for its adoption of the double standard, and it is this contention that has principally convinced both those American courts that have argued that there now exists a double standard, and those American legislatures that have statutorily introduced a higher standard for professional executors and trustees. For those who agree with this outcome, it seems absurd that no more is expected of a trust corporation, which combines a complete range of the technical services associated with skilled trust management, than of the widow or other well-meaning member of the testator's family who is likely to know little, if anything, of fiduciary administration before starting on the task.[33]

In England also, the courts have said that notice must be taken of the greater skill and experience of the trust corporation in the exercise of the judicial power to excuse trustees for breach of trust, but they have drawn the distinction between trustees on the basis of the fact that some charge fees for their services, while others, usually members of the trust creator's family, act gratuitously.[34] In the North American setting, however, where trustees are statutorily entitled to remuneration, unless the trust instrument denies payment, the distinction must necessarily be made on different grounds, and this is why expertise and advertisement of alleged skills have been stressed in the United States. In Canada, expertise and experience have therefore become the court's explanation for demanding more of trust corporations, where these institutions seek the exercise of the judicial excusing power in their favour. And again in Canada, proponents of a higher standard of care for professional trustees have not failed to observe the scarcely veiled unenthusiastic response of the Supreme Court of Canada in the *Fales* case to the fact that trust law in this country admits of only one standard of care for all trustees, whoever they may be.[35]

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[31] In contract law, one who holds himself out as having special skills is held liable to demonstrate such skills on the basis of an implied term or inducement to contract. The standard of performance is objective, namely, that of persons with that level of skill. Both in this situation, and where the contractor has special skills, but fails to exercise them at the level of performance that persons in that class would exhibit, he may be held liable on the basis of breach of a collateral warranty.

[32] See *MacDonald v. York County Hospital*, [1972] 3 O.R. 469, at 481, aff'd (1974), 1 O.R. (2d) 653 (C.A.). See, also, Fleming, *The Law of Torts* (6th ed., 1983), at 104 (footnote reference omitted): "[a] physician will be adjudged by the standard of the average practitioner of the class to which he belongs or holds himself out to belong: a higher level of skill will be demanded from a specialist than a general practitioner ...".

[33] The corporate trustee "represented itself as being possessed of greater knowledge and skill than the average man. It was therefore under a duty to exercise a skill greater than that of an ordinary man and the manner in which investments were handled must accordingly be evaluated in light of such superior skill": see *Re Estate of Killey*, *supra*, note 27, at 375, *per* Jones C.J. The Trust Division of the American Bankers Association has stated, "A trust institution should devote to its trust investments all the care and skill that it has or can reasonably acquire": Scott, *supra*, note 22, § 174, at 1141.

The case for the retention of a single standard of care in Ontario is also forceful. The argument does not seek to contest the principle that those who have special skills, or who attract trust business with the claim that they have such skills, should be held to their consequent responsibilities, but, rather, analyzes the advantages, and the effect, of introducing such a change in the law. The major objection is that there is no evidence that the importation of a higher standard of care for professional trustees is either needed or would achieve anything that cannot now be achieved. It has been noted that, of the reported American cases that have espoused the higher standard, none appears to have imposed a liability upon the professional trustee that could not have been reached with the prudent man standard.[36] Nor has any American judgment clearly stated what the higher standard involves. Negligence is a failure to employ the degree of care that in the circumstances might reasonably be expected, and the type of breach with which the majority of the higher standard of care cases has been concerned arises out of the investment power where the fault exhibited would have failed the prudent man test. Even in this jurisdiction, the Supreme Court of Canada concluded in the *Fales* case that the inability of the trust company to show that its branch office in Vancouver had properly monitored the security of the particular trust investment, and had liaised on the matter with its head office in Toronto, was a failure by any test. Indeed, it is asked, what more is expected than reasonable care? Attentiveness and prudence in a trust company is measured by the recognized office procedures and standards of trust company business.

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[34] *National Trustees Co. of Australasia, Ltd. v. General Finance Co. of Australasia, Ltd.*, [1905] A.C. 373 (P.C.), and *Re Waterman's Will Trusts*, [1952] 2 All E.R. 1054 (Ch. D.). See, however, *Bartlett v. Barclays Bank Trust Co. Ltd.*, [1980] Ch. 515, at 534. The Law Reform Committee of England, in its *Twenty-third Report: The Powers and Duties of Trustees* (Cmnd. 8733, October, 1982), paras. 2.13-2.15, is of the opinion that English case law already requires a higher standard of care of professionals in all circumstances. In Canada, see, also, *Krendel v. Frontwell Investments Ltd.*, [1967] 2 O.R. 579, at 585, 64 D.L.R. (2d) 471, at 477 (H.C.J.). These cases are sometimes misconstrued in American texts to suggest that Commonwealth courts have recognized the existence of a higher standard of care for professionals. This error may be because Americans are not familiar with the judicial excusing power. However, in the *Fales* case, *supra*, note 5, the effect of the exercise of the excusing power comes close to an apparent dual standard.

[35] This is the only reported Canadian case where the courts have canvassed the issue of a higher standard of care in relation to professional trustees. Dickson J., in *Fales, Wohlleben v. Canada Permanent Trust Co.*, *supra*, note 5, delivering the judgment of the Court, stated as follows, at 268, 269, and 271:

> The weight of authority to the present, [except in the exercise of the statutory judicial excusing power,] has been against making a distinction between a widow, acting as trustee of her husband's estate, and a trust company performing the same role. Receipt of fees has not served to ground, nor to increase exposure to, liability. Every trustee has been expected to act as the person of ordinary prudence would act.
>
> ....
>
> It is not necessary to decide whether a higher standard of diligence should be applied to the paid professional trustee, for Canada Permanent failed by any test.
>
> ....
>
> I have no doubt that in an appropriate case a paid professional trustee may seek and obtain relief under s. 98 [the judicial power to excuse trustees under the British Columbia *Trustee Act*]. Section 98 in terms admits of that possibility. All of the circumstances would have to be considered, including whether the trustee was paid for its services. . . . Among other relevant considerations is . . . whether the trustee is someone who accepted a single trust to oblige a friend or is a company organized for the purpose of administering estates and presumably chosen in the expectation that it will have specialized departments and experienced officials; above all, whether the conduct of the trustee was reasonable.

It is also asked who is a "professional"? Which persons who commonly undertake trusteeship within the scope of their professional practice can be said to have special skills or hold themselves out as having such skills? American authority includes lawyers,[37] and to this profession must surely be added accountants. But whether other professionals, such as stockbrokers and investment consultants, should also be included is an open question. On principle, even if they act gratuitously as members of the family of the testator or settlor, there would seem to be no reason why they should not be required to exercise the special skills that they have.

The truth of the matter, it may be argued, is that there is no such thing as a "professional trustee". Whereas a doctor with a specialty skill is carrying out a specific type of medical work, in which there can be agreed standards of competence and practice, a so-called professional trustee is merely one who performs a task, for the discharge of which he will usually charge a fee. This is why the American Restatement and the American Uniform Probate Code are careful to speak only of special skills and expertise, or an assertion of having such skills. The skills of a trust company, a lawyer, an accountant, and an investment consultant all differ; indeed, while the public may suppose that any lawyer can handle estate and trust administration, the particular lawyer may in fact specialize in corporate work, and have merely assumed the trust administration to accommodate his client. Should he later be free to argue that he had no special skills, and should he be judged by the same standard as applies to the widow? In fact, the introduction of a higher standard of care might turn out to be the introduction of subjective standards of care, each trustee's conduct being measured by what might be expected of that particular person or institution. The courts have always done their best to avoid this outcome; such a "standard" is no standard.

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[36] The final outcome of the *Killey* case, *supra*, note 27, appears not to have been reported.

[37] *Re Estate of Lohm*, 269 A.2d 451 (Pa. S.C. 1970). An attorney, it was held, must comply with a higher standard of care than a layman, but with a lower standard of care than an attorney experienced in estate tax matters. Critics note that the same differentiation would presumably have to be made in relation to other professionals.

In weighing the two arguments, for and against a standard for the so-called professional trustee higher than that of the prudent man of business, we have arrived at the conclusion, not without difficulty, that the revised *Trustee Act* should adopt the approach of the American Restatement and Uniform Probate Code. We believe a higher standard of care should be asked of those who have special skills, or who hold themselves out as having such skills. In the last analysis, it is for us a matter of principle that the trustee who is skilled, or who attracts trust work because of the public's perception of his skill, should be required to live up to that standard of conduct. If there are particular circumstances that are mitigating, these can always be considered by the courts under their excusing power, and in this way no injustice will be done.

Accordingly, we recommend that, in addition to the general duty of care applicable to all trustees,[38] trustees who in fact possess, or because of their profession, business, or calling ought to possess, a particular level of knowledge or skill which in all the circumstances is relevant to the administration of the trust, should employ that particular level of knowledge or skill in the administration of the trust.[39]

(d) JUDICIAL POWER TO EXCUSE BREACHES OF TRUST

As mentioned in previous sections, it does not necessarily follow that a trustee will be liable for the loss that his breach of duty has caused. In England, section 61 of the *Trustee Act, 1925*[40] permits the court to excuse a trustee wholly or partly for the consequences of his breach, if he has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach. On any specific question relating to the execution of a trust, a trustee in England may apply for the direction of the court under Order 85, rule 2, of the Rules of the Supreme Court, 1965.[41]

This excusing power of the court was first enacted as section 3 of the *Judicial Trustees Act, 1896*,[42] and has been reenacted in successive English Trustee Acts to the present day. It arose from recommendations of a Select Committee on Trust Administration, set up in 1895 by the English government of the day under the Attorney General, to inquire into the liabilities of trustees for breach, and to determine whether adequate trust administration might be secured without subjecting trustees to the "risks which they now run".[43] The principal concern of the Committee was with the liability of trustees for so-called technical breach, for instance, innocently paying trust moneys to a person who is subsequently proved not to be entitled to the moneys.[44] The Committee heard considerable evidence from judges and solicitors alike that the existing extent of what might be called strict liability, despite the then recent case law development of a general fault liability, placed far too onerous a burden on trustees.

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[38] Draft Bill, s. 4(1).

[39] *Ibid.*, s. 4(2).

[40] *Trustee Act, 1925*, 15 & 16 Geo. 5, c. 19 (U.K.).

[41] See *Underhill's Law relating to Trusts and Trustees*, *supra*, note 3, at 688-97.

[42] 59 & 60 Vict., c. 35 (U.K.).

[43] See Paling, "The Trustee's Duty of Skill and Care"(1973), 37 Conveyancer (N.S.) 48, at 53, *n*. 22. The Committee's report was heavily criticized at the time: see Maugham, "Excusable Breaches of Trust" (1898), 14 L.Q. Rev. 159.

However, perhaps because it was concerned about the then high level of trustee fraud in England, the Committee did not recommend any statutory formulation of the standard of care required of trustees. Instead, it recommended the conferment of the excusing power to which we have referred. This judicial power was subsequently adopted in the Trustee Acts of all provinces of Canada,[45] except Prince Edward Island, in all the states of Australia,[46] and in New Zealand.[47]

In Ontario, the judicial power to excuse trustees for breach of trust appears as section 35 of the *Trustee Act*, which provides as follows:[48]

> 35. If in any proceeding affecting a trustee or trust property it appears to the court that a trustee, or that any person who may be held to be fiduciarily responsible as a trustee, is or may be personally liable for any breach of trust whenever the transaction alleged or found to be a breach of trust occurred, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the court in the matter in which he committed the breach, the court may relieve the trustee either wholly or partly from personal liability for the same.

The section requires that a trustee must have acted honestly, reasonably, and be in the position that he ought fairly to be excused. The section, however, gives no guidance concerning what is intended by any of these factors, and the courts have not considered it possible or, perhaps, wise to lay down any general rules or principles to govern the exercise of their discretion under the section. Each case has been treated on its own merits.

Generally speaking, however, the courts seem to have interpreted "honestly" as an active involvement in the affairs and decisions of the trust administration, and "reasonably" as conduct associated with the ordinary prudent man of business. A trustee who pleads the section must therefore have acted in accordance with his duties of good faith and of care, and the onus of proof is upon him to show that he did so act. If fairness is not a mere description of the discretion that is given to the court, it requires the court to have in mind how excusing the trustee will affect, and can in all equity be permitted to affect, the interests of every party, namely, the beneficiaries and creditors of the trust.

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[44] Although the trustee is in good faith making payment, and may have carefully considered the proper construction of the trust instrument beforehand, his mistake of law exposes him to suit for breach of trust.

[45] See Waters, *supra*, note 1, at 873.

[46] See Meagher and Gummow, *Jacobs' Law of Trusts in Australia* (4th ed., 1977), at 517-21. See, also, Ford and Lee, *Principles of the Law of Trusts* (1983).

[47] *Trustee Act 1956*, Repr. Stat. N.Z. 1977, No. 61, s. 73.

[48] The power of a trustee in Ontario to apply to the Supreme Court of Ontario for advice and direction is also statutory. It is contained in s. 60 of the *Trustee Act*, R.S.O. 1980, c. 512.

It is because of the requirement of honesty and reasonable conduct on the part of the trustee that the section appears to be concerned essentially with technical breach.[49] A trustee is technically in breach if he acts in any respect and to the slightest degree contrary to the terms of the trust, properly construed. The formulation of the duty of care by the English House of Lords between 1887 and 1889 marked a substantial move away from strict liability to fault liability, but situations may still arise where an honest and reasonable mistaken act, not authorized by the trust instrument, and resulting in loss to the trust fund or a beneficiary, subjects the trustee to an action for breach. Payment to the wrong beneficiary,[50] or to a creditor whose claim was in fact unenforceable, and mistakes of law,[51] are examples of such situations, and the courts have exercised their statutory power to relieve trustees in these circumstances.

However, the courts have also exercised the excusing power in circumstances other than technical breach. Applications for relief have most commonly been made for the acquisition or retention of unauthorized investments, where the trustee can show that he was honest and careful in the acquisition or retention, but yet subsequently found himself outside the protection of the investment power. In a range of factual circumstances – which can only be listed, being decisions on the facts that do not fit into obvious categories – trustees have successfully sought relief. The excusing provision does not require the trustee to admit to a breach of trust; it merely requires that it be established that a trustee "may be personally liable for any breach of trust". Consequently, the courts have often excused a trustee without actually deciding that there was a breach, and this outcome can make it difficult to determine the difference between behaviour that constitutes breach and behaviour that justifies relief.[52]

We have already stated that this discretion permits the courts to divorce liability for breach of trust from the finding that a trustee has committed a breach, and that decisions by the courts in exercising the discretion do not readily constitute legal precedents, because a decision to exercise the discretion is essentially a decision on the particular facts in the light of all the particular circumstances. As we have noted, in 1895 the immediate concern of the English Attorney General's Committee that proposed this discretion appears to have been the relief of trustees from liability for so-called technical breach.

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[49] See Waters, *supra*, note 1, at 837-40.

[50] *Re Allsop*, [1914] 1 Ch. 1. But see *Re Diplock*, [1948] Ch. 465, which held that remunerated trustees are not entitled to be relieved for the same error.

[51] *Perrins v. Bellamy*, [1898] 2 Ch. 521, aff'd [1899] 1 Ch. 797 (C.A.).

[52] For a full discussion of the excusing power and the case authorities, see *Underhill's Law relating to Trusts and Trustees*, *supra*, note 3, at 727-31; *Lewin on Trusts*, *supra*, note 3, at 690-92; and Waters, *supra*, note 1, at 873-78. For a critical discussion, see Sheridan, "Excusable Breaches of Trust" (1955), 19 Conveyancer (N.S.) 420.

Accordingly, our first thought was whether it might not be better if the Ontario revised *Trustee Act* simply stated that a trustee should be excused for breach of trust only in those circumstances where he is not personally to blame, because of either his lack of good faith or his negligence. However, we have come to the conclusion that, having regard to the present state of the law, it is not possible to isolate all the circumstances that might constitute technical breach for which a trustee should be excused, and we are of the view that these should be known before recommending such a change in the law. Moreover, there may also be circumstances, possibly not constituting technical breach, in which some of the older precedents would impose liability upon trustees,[53] but where, because of the absence or minimal degree of fault, a modern court might prefer to take a less strict approach towards liability. It does seem to us, whatever the shortcomings of discretion in such a crucial area as liability, that it is valuable for the courts to be able to assess the merits of the conduct of each trustee who is challenged with an accusation of breach.

Despite the analytical problems, this fairly broad judicial discretion has been welcomed by the courts and the commentators. We are aware that, in view of the fact that we have recommended a higher standard of care for the so-called professional trustee, it might be contended that the necessity for the statutory judicial excusing power would be largely removed. As in the United States, it could be argued that the courts should decide whether a trustee was or was not in breach with reference to the standard of care applicable to the trustee in question, thereby obviating the necessity to determine indirectly, by the exercise of the judicial excusing power, whether a trustee should be liable for the breach of trust in the circumstances. We are not persuaded by this argument.

In our view, the judicial excusing power has meant, and should continue to mean, that, if relief is sought by a trustee, whether he is a non-professional or professional trustee, the courts can ensure that he is only liable to the extent that blame attaches to his conduct.[54] It requires more of the courts than a well-meaning indulgence towards trustees; it presupposes a careful, indeed deliberate, assessment of the trustee's fundamental duties as a fiduciary, and a sensitivity to the fact that the foremost, and perhaps only, protection of the beneficiary is that the person, who with considerable powers is administering the trust assets, must act with "viligance, prudence and sagacity".[55] On the whole, we are of the view that this Commonwealth approach has achieved and continues to achieve its original purpose, and we would therefore recommend its retention.

We have given some thought to whether section 35 of the Ontario *Trustee Act*, which confers the excusing power upon the Ontario Supreme Court, might usefully contain guidelines concerning the factors that should be considered by the courts in exercising their discretion. However, such is the diversity of situations that come before the courts that we doubt whether such guidelines would be of significant value. The statutory language in which the power is expressed – the trustee must have acted "honestly and reasonably", and he "ought fairly to be excused" – may not be the most felicitous, but the courts apparently have not encountered difficulties, and we can therefore see no case for unsettling language that has long been familiar.

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[53] Scott, *supra*, note 22, § 201, at 1650, is only prepared to commit himself to the proposition that "[o]rdinarily [a trustee] does not commit a breach of trust unless he is in some way personally at fault".

[54] In *Weir v. Jackson* (1905), 5 O.W.R. 281 (C.A.), Meredith C.J. said that in his view the judicial excusing power should be applied "very liberally" in Canada.

[55] *Supra*, note 5.

Accordingly, we recommend that section 35 of the present *Trustee Act*, permitting the court to excuse trustees for breach of trust, should be carried over to the revised *Trustee Act*. The revised Act should contain a provision to the effect that, if in any proceedings affecting a trustee or trust property it appears to the court that a trustee, or any person who may be held to be fiduciarily responsible as a trustee, is or may be personally liable for a breach of trust, whenever the transaction alleged or found to be a breach of trust occurred, but has acted honestly and reasonably and ought fairly to be excused for the breach of trust, and for not obtaining the directions of the court in the matter in which he committed the breach, the court may relieve the trustee either wholly or partly from personal liability for the breach.[56]

(e) Exoneration of Trustees from Liability by the Terms of the Trust Instrument

We have observed that trust instruments drawn in this Province, whether testamentary or *inter vivos*, very often exonerate the trustee from liability for any loss arising in the administration of the trust, if the trustee has acted in good faith. It is often stated expressly that the trustee shall not be liable for a mere mistake or error of judgment. This exoneration may be made applicable, for example, to the hiring of agents, but more often it is a general exoneration covering the whole of the trustee's activities with the affairs of the trust.[57]

The interpretation of such an exoneration clause may well be that the trustee is not liable for his negligence, unless it be a conscious or knowing wrongdoing. Such wrongdoing is usually intended by the term, "wilful default".[58] Where the trustee is exonerated from liability for "mistake", "error of judgment", or additional terms of that nature, the trust instrument must surely intend that wilful acts or omissions are to be the sole basis of liability; namely, deliberately wrongful conduct or conduct motivated by a complete disregard for the proprieties of trustee activity. If, on the other hand, such terms merely mean that the trustee is not to be liable where he has acted honestly and in conformity with the duty of care imposed on trustees, then these terms add nothing to the present case law position: the trustee would not be liable even if those words were absent from the trust terms. It is also possible in the circumstances that a trustee may be held not to have acted "in good faith" where he has merely been negligent, but such an interpretation would be strained. If "good faith" is intended to include simple negligence – that is, an absence of the degree of care that a prudent man would employ – then again this merely holds a trustee to his existing liability under the case law. Yet this would not be the natural meaning of "good faith", which infers a state of mind, an honesty of purpose.

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[56] Draft Bill, s. 69.

[57] Precedents in use in Ontario include the following: "My trustee is not to be held responsible for loss arising out of the exercise of [the power] . . . to delegate when he considers necessary any of his powers duties or discretions as he thinks fit"; the trustee is not to be liable "for any loss suffered . . . by reason of any acts or omissions [of a special fiduciary appointed to administer foreign trust assets] not attributable (a) to his own dishonesty, or (b) to the wilful commission by him of an act known by him to be a breach of trust".

[58] The term "wilful default" is contained in s. 33 of the Ontario *Trustee Act* to describe the nature of conduct required for the imposition of liability on trustees in relation to the handling of trust moneys and securities.

Whatever be the intention of a testator or settlor in employing such terms, we have concerns about the ability of a trust instrument to exonerate a trustee from liability for negligence. Negligence is the more usual manner in which a trustee becomes liable, and we do not consider that the risk of loss through trustee negligence should properly fall upon the trust beneficiary or beneficiaries. Nor can we see any reason that would justify shifting such a risk to the beneficiaries. A professional trustee should be carrying insurance, and a non-professional trustee who is sufficiently unsure of his competence to require such safeguards should not accept the office. As we have discussed, Ontario courts possess, and have often exercised, a power under section 35 of the *Trustee Act* whereby a trustee may be excused from liability, wholly or partly, if he has acted "honestly and reasonably, and ought fairly to be excused for the breach of trust", and the Commission has recommended the retention of this power. Given the existence of the judicial excusing power, we question the desirability of a clause in the trust instrument exonerating trustees from liability for negligence. The duty of care is a basic obligation imposed upon all trustees, and, in protecting the beneficiary, it complements the powers over the trust property that are given to the trustee.[59]

As noted previously, section 7-302 of the American Uniform Probate Code permits the trust instrument to provide expressly that the standard of care prescribed by the section for both non-professional and professional trustees does not apply.[60] While the trust instrument could, of course, hold trustees to a higher standard than that provided by the Code, the more likely provision would be the express exoneration of trustees from liability for failure to conform with the standard of care set forth in the Code.

Such exoneration clauses are not valid, however, in all American jurisdictions. For example, in those states that have adopted the American Law

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[59] With regard to the duty of care and its exclusion in the somewhat analogous situation of a company director, see *Canada Business Corporations Act*, S.C. 1975, c. 33, s. 117(3), which provides that no provision in a contract, etc., can relieve a director or officer from the duty to act in accordance with, among other things, the duty of care set forth in s. 117(1), or relieve him from liability for a breach thereof. See, also, the Ontario *Business Corporations Act, 1982*, S.O. 1982, c. 4, where, in the context of trusts for bondholders, s. 47(1) makes statutory the case law duty of care, and s. 47(2) invalidates any provision in an instrument that purports to exculpate trustees who are nevertheless guilty of wilful misconduct or negligence.

[60] *Supra*, notes 23 and 24 and accompanying text.

Institute Restatement of the Law of Trusts, a middle ground is provided in section 222.[61] This section states, as a general proposition, that "the trustee, by provisions in the terms of the trust, can be relieved of liability for breach of trust". However, this principle is subject to two qualifications. First, section 222(2) provides that "[a] provision in the trust instrument is not effective to relieve the trustee of liability for breach of trust committed in bad faith or intentionally or with reckless indifference to the interest of the beneficiary, or of liability for any profit which the trustee has derived from a breach of trust". Secondly, section 222(3) states that, "[t]o the extent to which a provision relieving the trustee of liability for breaches of trust is inserted in the trust instrument as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor, such provision is ineffective".

Since the Decedent Estate Law of 1936, New York State has also invalidated exoneration clauses in wills relating to the standard of care. That legislation was further considered by the State Commission on the Law of Estates, 1963-65,[62] and its provisions were re-enacted in the Estates, Powers, and Trusts Law of 1966.[63] Section 11-1.7 provides, in part, as follows:

> 11—1.7(a) The attempted grant to an executor or testamentary trustee or the successor of either, of any of the following enumerated powers or immunities is contrary to public policy:
>
> (1) The exoneration of such fiduciary from liability for failure to exercise reasonable care, diligence and prudence.

The 1966 Act further provides, in section 11-1.7(b), that any attempted exoneration in breach of this prohibition invalidates the instrument only to the extent that the instrument is in breach.

Over the period of more than forty years since this prohibition has been in force in New York, we can find no evidence in the literature that any objection has been raised, and none appears to have been made before the State Commission in the 1960's. Indeed, the same policy appears to have been adopted by the Indiana Trust Code.[64] Section 30-4-3-11 and -12 provides that a trustee is in breach of trust if he fails to exercise reasonable care in the selection, retention, and supervision of an agent, or enables a co-trustee to commit a breach through his (the trustee's) own failure to exercise care. These sections are not made subject to the expression of a contrary intent in the trust instrument.

We therefore recommend that no term in a trust instrument, or in an oral declaration of trust, should be valid to the extent that it purports to exonerate trustees from liability for failure to exercise the degree of care, diligence, and skill that a person of ordinary prudence would exercise in dealing with the property of another person.[65]

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[61] *Supra*, note 20, § 222, at 516-17.

[62] Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates, Second Report (Legislative Document No. 19, 1963).

[63] N.Y. Est., Powers & Trusts Law, § 11-1.7 (McKinney).

[64] Ind. Stats. Ann., Code Ed., tit. 30 (Burns).

Moreover, for the same reasons, and again unlike the American Uniform Probate Code,[66] we are of the view that the settlor or testator should not be free to exonerate a professional trustee from a failure to demonstrate the higher standard of care that we have recommended. We therefore recommend that no term in a trust instrument, or in an oral declaration of trust, should be valid to the extent that it purports to exclude or lower the standard of knowledge or skill required by trustees who in fact possess, or who because of their profession, business, or calling ought to possess, a particular level of knowledge or skill which in all the circumstances is relevant to the administration of the trust.[67]

3. DELEGATION BY TRUSTEES OF DUTIES OR POWERS

(a) INTRODUCTION

The maxim adopted from Roman law, which summed up the principle followed by the seventeenth century courts of Equity, was *delegatus non potest delegare*: one who is himself a delegate cannot delegate further to another. However, even in the days when trustees were middle class gentlemen handling the affairs of their relatives or friends, it was evident that this principle could not be carried to the point where everything that was done for the trust had to be done by the trustee personally. By 1754, the courts had established that a trustee might delegate, provided it was clearly necessary, or in the common course of business for men engaged in similar affairs to delegate the matter in question to an agent.[68] Trustees needed the services of solicitors, accountants, brokers, and persons of a variety of skills, just as much as men of those skills would call upon each other's services from time to time.

Since a trustee is a fiduciary, the assumption of the law, as indicated, is that he must perform his tasks personally. The two principal issues that arise from this assumption, and that we have examined, are first, what acts may a trustee properly delegate to an agent; and secondly, what personal liability has the trustee to the beneficiaries for loss to the trust caused by the agent? The answer to these questions is to be sought today in the trust instrument, in case law, and in statute.

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[65] Draft Bill, s. 7(*a*).

[66] *Supra*, notes 23 and 24 and accompanying text.

[67] Draft Bill, s. 7(*b*).

[68] *Ex parte Belchier* (1754), Amb. 218, 27 E.R. 144, a decision of Lord Chancellor Hardwicke relating to an assignee (or trustee) in bankruptcy. This decision was followed by the leading case of *Speight v. Gaunt*, *supra*, note 8. See, also, *Lewin on Trusts*, *supra*, note 3, at 181 *et seq.*, for a discussion of the law in England prior to the *Trustee Act, 1925*.

(b) ACTS THAT A TRUSTEE MAY DELEGATE

(i) Common Law

Probably the majority of trust instruments professionally drawn today in Ontario will permit the trustee to appoint agents of any description to perform any task or exercise any discretion that the law or the instrument requires to be done. The aim of the draftsman in so doing is to give the trustee the maximum freedom to handle the trust affairs as he thinks fit. This approach is justified because of the emphasis that is placed upon the initial choice of trustees, rather than upon any attempt to seek protection for the beneficiaries through a circumscription of what trustees may do in office. The intent of such a broad provision is to empower the trustees to appoint agents to perform not only administrative tasks, whether or not they involve the exercise of discretion, but also, it would seem, dispositive discretions, such as powers of maintenance, advancement, and encroachment.

It is unclear, however, whether full effect will be given to broad powers of delegation contained in trust instruments. In interpreting these clauses, the courts require that the trustee show that it was intended that he should be able to delegate the exercise of dispositive discretions, and also of crucial administrative questions affecting policy. Indeed, the greater the ostensible authority to delegate, the more precisely the courts are likely to require the particular act of delegation to be authorized by the trust instrument.[69]

The court might even take the view that the testator or settlor had no power to authorize the purported grant of delegation. A trustee is a fiduciary, and the consequent legal assumption, as we have seen, is that he will perform his duties personally. Is it compatible with trusteeship, for example, that a trustee be authorized by the trust instrument to delegate to an investment dealer the entire responsibility for the investment policies, as well as the purchases and sales, of the trust property?

The answer to these questions is not easy to provide. The testator or settlor has chosen to confer upon his trustees the widest possible powers of delegation, and the courts, aware of the technical services required by the modern trustee, but also cognizant of the dangers of unlimited delegation, are likely to say that the answer lies in an examination of all the circumstances. It may also be considered relevant that, as a fiduciary, the trustee has a duty to act with care and prudence. Total delegation of investment decisions, although ostensibly permitted, may be considered something that a careful and prudent man would not have done in the circumstances. In this way the issues of what the instrument purports to permit, and what it may validly permit, are avoided.[70]

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[69] The judgments in the English Court of Appeal and the House of Lords, *supra*, note 68, remain the classic case law position.

[70] In *Fales, Wohlleben v. Canada Permanent Trust Co.*, *supra*, note 5, the Supreme Court of Canada had clearly in mind the trustee's basic duty of care, whatever language might appear in the instrument.

In the absence of provision in the trust instrument, the case law takes a more conservative approach to the use of agents. The 1754 decision of *Ex parte Belchier*[71] essentially represents the position today: a trustee may delegate if the nature of the task to be performed necessitates delegation, or if it is common business practice to employ an agent in the circumstances. If the trustee can easily do the work himself, the case law will not permit the employment of an agent, unless perhaps common business practice is otherwise.[72] For instance, the trustee is not expected to carry out work just because he has the special skill required, or because no skill is required. The test does not turn on having skills, but on what is generally considered reasonable in the normal course of property management. As to matters involving the exercise of discretion, however, the case law requires the trustee himself to make such decisions, whatever advice he may have sought and received.[73]

If an agent may be employed, the case law requires the trustee to select the agent himself, and he must select a person whose business it is to carry out the work that the trustee is proposing to delegate.[74] This is not quite so simple as it looks, however. If a house that is trust property is in need of repair, it would probably not be enough for the trustee to ask his solicitor for the names of suitable building contractors, from among whom a choice may be made. If poor work and loss to the trust result, the trustee would have to show that, from the nature of his practice, the solicitor had a particular knowledge of builders and the quality of work that each of the named contractors performed. Moreover, once the agent is appointed, the trustee must carry out a reasonable level of supervision of the work being done, until the work is complete.[75]

Where trust property is concerned, especially trust funds, the trustee must ensure that, if an agent is to receive moneys on behalf of the trustee, the moneys are not left in the agent's hands for an unnecessary length of time. It is a cardinal rule that the trustee must always be adroit to see that, at all times, trust property is under his own control.[76] This principle would also apply to a properly arranged nomineeship or custodianship.

The employment of a co-trustee as an agent is subject, it would seem, to the same rules. For instance, it has been specifically held that trustees should not permit trust funds to be under the sole control of a co-trustee for an unnecessary length of time.[77] On the other hand, because the co-trustee is a trustee, to allow deeds or documents to remain in the co-trustee's possession would not be improper, if that is a more convenient course to pursue.[78] The features distinguishing a trustee's position from that of an agent, however, are that he must act jointly with his fellow trustees in order to bind the trust, and that no trustee may be inactive in relation to the conduct of trust affairs. Although the courts have not formulated the resulting position in so many words, this means that the trustees must be as concerned with a fellow trustee's acts on behalf of the trust as they would be with any other agent, and that a co-trustee can only do those things that another agent can do. For instance, the exercise of discretions must be exercised by all the trustees unanimously.[79]

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[71] *Supra*, note 68.

[72] *Re Brier* (1882), 26 Ch. D. 238 (C.A.).

[73] *Re Speight*, *supra*, note 8, at 756.

[74] *Fry v. Tapson* (1884), 28 Ch. D. 268, at 280, and *Re Weall* (1889), 42 Ch. D. 674.

[75] *Speight v. Gaunt*, *supra*, note 8.

[76] *Wyman v. Paterson*, [1900] A.C. 271 (H.L.), and *Re Sheppard*, [1891] 1 Ch. 50.

[77] *Scurfield v. Howes* (1790), 3 Bro. C.C. 90, 29 E.R. 425; *Candler v. Tillet* (1855), 22 Beav. 257, 52 E.R. 1106; and *Lewis v. Nobbs* (1878), 8 Ch. D. 591.

[78] *Re Sisson's Settlement*, [1903] 1 Ch. 262.

(ii) Statute

a. *Commonwealth*

Statutory intervention in respect of the power to delegate came in the usual nineteenth century manner. That is, powers of delegation, which were familiar in well-drawn trust instruments of the period, were introduced by statute to be implied in trust instruments, subject to the expression of a contrary intent. The Trustee Acts of 1888 and 1893 in England thus put it beyond question that solicitors and bank managers might be appointed agents to receive moneys on behalf of trustees, and also empowered these agents to give discharges to the payors.[80] "Money or any valuable consideration or property" might be the subject matter of such receipt and discharge. However, it was made clear that, if any trust property were allowed to remain in such an agent's control for an unnecessary length of time, and loss resulted, the liability imposed upon the trustee by the case law would continue to arise.

Ontario adopted this form of the English legislation early in the twentieth century, and it remains as section 20 of the Ontario *Trustee Act*. The section provides as follows:

> 20.—(1) A trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust.
>
> (2) A trustee may appoint a manager or a branch manager of a chartered bank or a solicitor to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of assurance or otherwise.
>
> (3) A trustee shall not be charged with a breach of trust by reason only of his having made or concurred in making any such appointment.
>
> (4) Nothing in this section exempts a trustee from any liability that he would have incurred if this Act had not been passed, in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable the banker or solicitor to pay or transfer the same to the trustee.

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[79] See *infra*, this ch., sec. 5.

[80] *Trustee Act, 1888*, 51 & 52 Vict., c. 59, s. 2 (U.K.), and *Trustee Act, 1893*, 56 & 57 Vict., c. 53, s. 17 (U.K.).

In 1925, however, England incorporated the 1893 provision as subsection (3) of a considerably broader power of delegation. Section 23(1) and (2) of the English *Trustee Act, 1925*[81] has been the model for subsequent Trustee Act amendments in Manitoba,[82] New Zealand,[83] and the Australian states of Victoria, Western Australia, and Queensland.[84] Section 23(1) and (2) of the English legislation provides as follows (emphasis added):

> 23.—(1) Trustees or personal representatives may, instead of acting personally, employ and pay an agent, whether a solicitor, banker, stockbroker, or other person, *to transact any business or do any act required to be transacted or done in the execution of the trust*, or the administration of the testator's or intestate's estate, including the receipt and payment of money, and shall be entitled to be allowed and paid all charges and expenses so incurred, and shall not be responsible for the default of any such agent if employed in good faith.
>
> (2) Trustees or personal representatives may appoint any person to act as their agent or attorney for the purpose of selling, converting, collecting, getting in, and executing and perfecting insurances of, or managing or cultivating, or otherwise administering *any property*, real or personal, moveable or immoveable, *subject to the trust* or forming part of the testator's or intestate's estate, *in any place outside the United Kingdom* or executing or exercising any discretion or trust or power vested in them in relation to any such property, with such ancillary powers, and with and subject to such provisions and restrictions as they may think fit, including a power to appoint substitutes, and shall not, by reason only of their having made such appointment, be responsible for any loss arising thereby.

These two provisions liberalized greatly the prudent man rule that arose out of *Speight v. Gaunt*.[85] Whereas before 1925 the trustee was subject to the standard of the prudent and reasonable man of business in delegating any task, as well as in selecting the agents whom he did appoint, he now might employ agents to discharge any task at all, regardless of whether necessity or the usual course of business would justify the delegation. It seems that, by virtue of section 23(1), any duty may be delegated, whether or not it is discretionary, and, *a fortiori*, any power may be delegated, whether it is administrative or dispositive in nature.[86] Subsection (2) is couched in different language, but appears to be equally liberal in relation to trust property, and the conduct of the trust in relation to that property, outside the United Kingdom.

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[81] *Supra*, note 40.

[82] *The Trustee Act*, R.S.M. 1970, c. T160, s. 37(1) and (2).

[83] *Trustee Act 1956*, *supra*, note 47, s. 29.

[84] See Meagher and Gummow, *supra*, note 46, at 318-25, and 325-26 (foreign property), and Kelly (ed.), *Garrow and Kelly's Law of Trusts and Trustees* (5th ed., 1982), at 256-59.

[85] *Supra*, note 8.

[86] Whether, and, if so, how far this subsection has changed the law in England is still a matter of keen debate. For a full review of the debate, see Keeton and Sheridan, *The Law of Trusts* (10th ed., 1974), ch. 16, and Supp., at 239-41. Pettit, *Equity and the Law of Trusts* (4th ed., 1979), at 333-34, is of the view that only ministerial tasks may be delegated under section 23(1), but this appears to be the minority view, although the Law Reform Committee in England is of the same opinion: see *supra*, note 34, paras. 4.1-4.6.

b. United States

Although Manitoba, New Zealand, and the majority of the Australian states have adopted the language of section 23(1) and (2) of the English Act,[87] it is interesting to note that the states of the United States have considered a less liberal position to be appropriate. Little statutory intervention has taken place, and the courts appear to have pursued a more cautious and conservative position, more in line with the prudent man approach to delegation espoused by the English and Commonwealth courts. Bogert[88] lists the tasks, all ministerial, that the courts have permitted trustees to delegate, and Scott[89] finds in the American precedents a distinction between the ability to delegate dispositive and administrative discretions: no dispositive discretion may be delegated, and an administrative discretion may only be delegated where it forms a less significant part of an otherwise delegable task.[90]

The American Uniform Trustees' Powers Act, proposed by the National Conference of Commissioners on Uniform State Laws,[91] confers a broad power of delegation, but also appears to distinguish between administrative and dispositive discretions for the purposes of delegation. Section 3(c)(24) of the Act states as follows:

> 3. (c) A trustee has the power, . . .
>
> (24) to employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the trustee, to advise or assist the trustee in the performance of his administrative duties; to act without independent investigation upon their recommendations; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary.

A distinction appears to have been made in section 3(c)(24) of the American Uniform Act between "advise or assist" and "perform", which suggests that the agent can be given a significant trustee task, including an administrative discretion that he alone is to carry out. However, dispositive acts and discretions are not mentioned specifically, although it is possible that the word, "administrative", is intended to include all that a trustee does. On the other hand, the exclusion of the exercise of dispositive discretions from the tasks that may be delegated seems the more natural interpretation.

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[87] South Australia and Tasmania retain powers comparable to the English 1893 language, and New South Wales adopts an intermediate approach: see Meagher and Gummow, *supra*, note 46, at 318-25, and 325-26 (foreign property).

[88] Bogert, *supra*, note 26, § 556, at 66-81, and Supp., at 134-54.

[89] Scott, *supra*, note 22, § 171, at 1388-89.

[90] For a comparative study of delegation in England and the United States, see Baringhaus, "Trustee's Power to Delegate: A Comparative View" (1974-75), 50 Notre Dame Law. 273.

[91] Uniform Trustees' Powers Act, National Conference of Commissioners on Uniform State Laws (73d Annual Conference, 1964), Uniform Laws Ann. (1978), Vol. 7A, at 761, and Cum. Supp. (1982), at 365.

The Uniform Act was approved by the National Conference of Commissioners on Uniform State Laws, together with the American Bar Association, in 1964, and has been adopted to date by eleven states: namely, Florida (1974), Idaho (1965), Kansas (1968), Kentucky (1976), Maine (1979), Mississippi (1966), Montana (1974), New Hampshire (1969), Oregon (1977), Utah (1975), and Wyoming (1965).

(iii) Conclusions

The alternative policies that might be pursued are several. First, section 20 of the Ontario *Trustee Act* could be repealed. This would leave the case law in place, which, as we have seen, represents a cautious and conservative position in the matter of delegation by trustees. The limitation of this approach stems from the early equity position that a trustee may not delegate; delegation at common law is therefore an exceptional situation, and may be prohibited even where delegation would be a prudent course of management. A liberal power of delegation, policed by the case law requirements of trustee vigilance and prudence, would appear to be more consistent with present ideas.

Secondly, the recommendation might be for no change of any sort. But this would leave section 20 of the Ontario *Trustee Act* as the only addition to case law, and all the precedents in use in the Province today suggest that the section has been overtaken by time and represents the views of the late nineteenth century.

Thirdly, it might be appropriate to replace section 20 by a new section that permits the delegation of any administrative task, whether or not it involves a discretion, but expressly subject to the general duty of care. The case law duties concerning the selection and supervision of agents would become express, so that there would be no doubt how the case law should be applied. However, no authority would be given to the trustee to delegate any dispositive duty or discretion, such as the choices required of him under a discretionary trust and in the exercise of powers of maintenance, advancement, and encroachment. It is in this manner that the third approach falls short of many precedents – namely, authority to delegate any task of whatever kind – and for many draftsmen the revised Act would still, therefore, be inadequate. Fourthly, the Act might adopt just such a contemporary express clause permitting unlimited delegation.

We have concluded that neither the first nor the second alternative is commendable in today's conditions, for the reasons given. As between the third and fourth approach, we favour the third because it pursues a middle line between the limitations of the case law and the licence of many contemporary precedents. We believe that the third alternative recognizes the indisputable authority that trustees must have to delegate whenever it is reasonable and prudent by contemporary business standards to do so. The balancing consideration is that the trust beneficiaries must be adequately protected, and for this purpose we would rely on the trustee's duty of care, which we have recommended should be placed in statutory form, to police the exercise of this power of delegation. The effect of this approach would be, for instance, that, if a trustee wished to delegate his entire investment discretion to brokers, he would be reminded by the statutory duty of care that he can only do this if a reasonable and prudent man of business would do the same. We can envisage no circumstances where total delegation of such a power – that is, without personal selection of any investment, or regular reports from the dealers that the trustee analyzes with a reasonably informed mind – would be compatible with care and prudence.

On the other hand, we are of the view that a statutory power of delegation should only extend to the delegation of administrative discretions, and should not permit the trustee to delegate dispositive discretions. A trustee should perform dispositive tasks personally, and we suspect that, in practice, this is what is done, however facultative the power to delegate may be in the trust instrument. If the testator or settlor wishes his trustee to possess power to delegate dispositive discretions, this could, of course, be expressed in the trust instrument.

We therefore recommend that section 20 of the Ontario *Trustee Act* should be repealed. In its place, we recommend enactment of a provision authorizing trustees, where it is reasonable and prudent in the circumstances so to do, to employ one or more persons as agents within or outside Ontario to carry out any act required to be done in the administration of the trust, including the execution of documents, the payment, transfer, and receipt of money or other property, and the giving of discharges for receipts, but excluding the exercise of any express or statutory discretion as to the transfer or distribution of trust property to or among beneficiaries of the trust.[92]

We are also of the view that, for the purpose of this proposed power of delegation, an agent should include a co-trustee. However, we would place one restriction upon the power to delegate to co-trustees, namely, that where there are only two trustees, one trustee should not be able to delegate to the other except where the latter is a trust company. Accordingly, we recommend that for the purpose of the proposed powers of delegation an agent should include a co-trustee.[93] We further recommend that a non-corporate trustee should be able to delegate, to the extent that we have recommended, to the other trustees where there are two or more non-corporate trustees, or to a sole co-trustee, if the sole co-trustee is a trust company, but that, except where a sole trustee was originally appointed, where there are two trustees only and neither is a trust company, neither should be able to delegate to the other.[94]

(c) DUTY OF CARE AND LIABILITY OF TRUSTEES FOR LOSS CAUSED BY THE ACT OR OMISSION OF AGENTS

(i) Present Law

The trust instrument may relieve the trustee of any liability for losses caused by the act, omission, or advice of an agent. The case law, however, is more evidently concerned with the protection of the beneficiaries. Every trustee is required to exercise the care of the reasonable man, as well as to be honest and objective in all his dealings on behalf of the trust and with trust property, and the case law constantly reiterates this requirement. A careful man selects the agent who is to perform a task, making sure, so far as a prudent man can, that the task lies within the ordinary business of the agent, and he carries out a reasonable surveillance of what the agent is doing, until the task is complete. A trustee is not therefore personally liable if the agent, despite such selection and trustee attentiveness to the discharge of the task according to the usual practice of business, causes loss to the trust.[95] It is also clear, as we have noted, that a trustee may not excuse himself from responsibility for loss, if he has permitted trust moneys to remain in an agent's hands or under the agent's control for a longer period of time than is reasonably necessary.[96]

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[92] Draft Bill, s. 5(1).

[93] *Ibid.*, s. 6(1).

[94] *Ibid.*, s. 6(2).

These common law rules were not changed by the Trustee Acts of 1888 and 1893 in England, and therefore remain unchanged by section 20 of the Ontario *Trustee Act*. In addition, section 33 of the *Trustee Act* deals with one aspect of a trustee's liability for agents, namely, where money and securities of the trust are in the control of others. The section states in part that a trustee is "answerable and accountable only for his own acts, receipts, neglects or defaults, and not for those of any other trustee, nor for any banker, broker or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default".

The considerable broadening of the power to delegate that occurred in the English *Trustee Act, 1925* was accompanied by language that appears to lessen the degree of responsibility of trustees where agents are appointed. Certainly the position is now not clear in England, and the legislation has sparked both litigation and controversy.[97] Section 23(1) of the English Act, which we earlier reproduced, ends as follows: "and [trustees] shall not be responsible for the default of any such agent if employed *in good faith*". For the purposes of the administration of trust property outside the United Kingdom, section 23(2) of the Act ends in the following manner: "and [trustees] shall not, *by reason only of their having made such appointment*, be responsible for any loss arising thereby".[98] It is instructive to compare this language with that employed in section 30(1) of the English Act, which is of nineteenth century origin. This section deals with the extent of liability of trustees in relation to the handling of trust moneys and securities, and appears as section 33 in the Ontario *Trustee Act*. Section 30(1) of the English Act provides, so far as is relevant, that a trustee is not liable for loss caused by certain specified agents' acts or omissions, "unless the same happens through his [the trustee's] own *wilful default*". The emphasized words, especially the "good faith" of section 23(1) of the English Act, and the "wilful default" of section 30(1) of the English Act, are expressions of the trustee's liability that are not employed in the case law in this way; "good faith" is used together with "and the care of the reasonable man",[99] and "wilful default" is associated with the liability clauses of insurance policies.[100]

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[95] *Speight* v. *Gaunt*, *supra*, note 8.

[96] See cases, *supra*, note 77.

[97] See *supra*, note 86. See, also, *Re Lucking's Will Trusts*, [1968] 1 W.L.R. 866 (Ch.D.), at 874; *Re Vickery*, [1931] 1 Ch. 572; and *Brown v. Brown*, [1931] O.R. 759, [1931] 4 D.L.R. 420, rev'd on other grounds [1932] 2 D.L.R. 819 (C.A.). See, further, Waters, *supra*, note 1, at 607-08.

[98] Emphasis added.

It is for these reasons that differences of opinion have arisen concerning the meaning of the language of section 23(1) of the English Act, and to what extent, if at all, it has changed the case law. As we noted earlier, this same legislation has been adopted in New Zealand and the Australian states of Western Australia, Queensland, and Victoria, and therefore these issues of meaning have travelled there also.[101] Manitoba, alone of the Canadian jurisdictions, has adopted section 23 of the English *Trustee Act, 1925* in its *Trustee Act*.[102]

(ii) Conclusions

We are of the view that the case law position regarding the liability of trustees for agents is both clear and as appropriate as when *Speight v. Gaunt* was decided. We can see no gain for Ontario in adopting the language employed in relation to this issue by the English legislation of 1925.

The essential point in the case law is that a trustee owes the observance of good faith and care in all that he does on behalf of the trust, and in the handling of trust property. Accordingly, we recommend that, in employing an agent, trustees should personally select the agent and be satisfied of his suitability to perform the act for which he is to be employed, and that they should carry out such supervision of the agent throughout his employment as is prudent and reasonable.[103] Moreover, as we recommended earlier with respect to the general duty of care, we similarly recommend here that no term in a trust instrument, or in an oral declaration of trust, should be valid to the extent that it purports to absolve the trustees from this duty in the employment of agents.[104]

Having observed the requisite duty of care in employing and in selecting and supervising agents, we consider that the revised *Trustee Act* should include an express provision to the effect that a trustee is only chargeable for loss caused by an agent, or by a co-trustee acting as agent, when any part of the loss is due to the trustee's breach of the abovementioned duty of care,[105] or otherwise to his own negligence or wilful wrongdoing. Such a provision would replace that part of section 33 of the present *Trustee Act* dealing with the extent of liability of trustees for defaults involving money and securities of the trust in the hands of others. Accordingly, we recommend that trustees should only be chargeable for loss caused by the default of an agent if the loss is due, wholly or partly, to a breach of the recommended provisions concerning the power to employ agents and the duty of care in selecting and supervising agents, or otherwise to the trustees' negligence or wilful wrongdoing.[106]

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[99] Nevertheless, Hanbury and Maudsley, *Modern Equity* (11th ed., 1981), at 580-84, is of the view that "good faith" does not change the pre-1926 law as to the liability of trustees for their agents. This interpretation appears not to be shared by the English Law Reform Committee: see *supra*, note 34, para. 4.11.

[100] *Re City Equitable Fire Insurance Co., Ltd.*, [1925] Ch. 407 (C.A.), foll'd in *Re Vickery*, *supra*, note 97. See, also, Waters, *supra*, note 1, at 607-08.

[101] *Supra*, notes 83 and 84.

[102] *Supra*, note 82.

[103] Draft Bill, s. 5(2).

[104] *Ibid.*, s. 7(*c*).

[105] See *ibid.*, s. 5(1) and (2).

(d) RELIANCE UPON ADVICE

The draft legislation that we have proposed concerning the occasions when a trustee may delegate, and the extent of his liability for loss caused by an agent, requires the trustee to select personally the person who is to give advice, and to carry out whatever supervision of the preparation of that advice would be prudent and reasonable. The issue that arises is whether, having done all this, a trustee should be able to rely upon the advice given without inquiring further or incurring liability for any loss arising as a consequence of failure to inquire.

In practice, the trustee would usually seek advice from a person whose skill or ordinary business it is to advise on the matter in question and, having received the advice, would proceed on the basis of it. Indeed, express clauses commonly introduced in trust instruments in Ontario will state that the trustee may rely upon such advice without making further inquiries.

Under the case law, however, a trustee must satisfy himself, so far as a prudent man can reasonably do, that he can safely rely upon the advice given by an agent. The implications of this common law position were discussed in *Fry v. Tapson*.[107] In that case, a trustee sought the professional advice of a valuator concerning whether certain land was adequate security for a loan by way of mortgage by the trust. The valuator advised in terms "which read more like the language of an auctioneer puffing what he had to sell than of a man exercising a calm judgment upon its value as a security for a loan of trust money".[108] The Court noted that solicitors of experience had given evidence confirming that no prudent lender, whether or not a trustee, would have loaned money on the advice given as to value. When the security had subsequently to be realized, and was found to be inadequate to cover the loan, the trustee was held personally liable for the balance. The clear finding, then, is that a trustee must exercise care and prudence throughout, and he does not do this by relying blindly upon advice, whatever form it may take.

Statutory provisions dealing with the extent to which an agent's advice may be relied upon do not appear to impose as stringent an obligation on trustees to evaluate the advice as does the case law. For example, we referred previously to section 3(c)(24) of the American Uniform Trustees' Powers Act, which authorizes trustees to employ agents and "to act without independent investigation upon their recommendations".[109] This provision seems to enable a trustee to act on any agent's recommendation without looking into the matter himself. It would appear that, if the agent is properly selected for the task, and presumably adequately supervised, the trustee is thereafter entitled to rely absolutely upon advice given him by the agent and will not incur liability if that advice results in loss to the trust.

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[106] *Ibid.*, s. 5(3). As regards that part of section 33 of the present Ontario *Trustee Act* that deals with the reimbursement of expenses incurred by the trustee, see *infra*, this ch., note 171 and accompanying text.

[107] *Supra*, note 74.

[108] *Ibid.*, at 280.

This position is also reflected in the somewhat analogous situation of a company director's ability to rely upon advice. Section 118(4) of the *Canada Business Corporations Act*[110] entitles a company director to rely upon the written report of the company's auditor as fairly reflecting the financial condition of the corporation, or upon "a report of a lawyer, accountant, engineer, appraiser or other person whose profession lends credibility to a statement made by him". Section 118(4) of the Act further provides that the director may rely on any of the reports mentioned, and is not liable for breach of the general duty of care[111] "if he relies in good faith".[112]

Although it may be argued that, in practical terms, there is no difference between the obligation imposed by the "good faith" requirement of section 118(4)(*b*) of the *Canada Business Corporations Act* and the "good faith" plus prudence standard set forth by the case law, we prefer to reiterate the case law duty in the revised *Trustee Act*. In our view, a trustee who relies simply on the fact that he has received advice from a person with qualifications in the area concerned, although the nature or form of the advice would cause concern to a prudent man, is surely demonstrating that he is indifferent to whether or not he is performing his fiduciary responsibilities when he proceeds on the basis of that advice. Moreover, trusteeship has always been regarded as the most intense of fiduciary relationships – in this case, the relationship is between the trustee and the trust beneficiaries. The Ontario and federal Business Corporations Acts attempt to establish the extent of the fiduciary obligations of a company director, a fiduciary relationship that has been recognized as less intense.[113]

Accordingly, unlike the statutory provisions referred to previously, and more akin to the case law position, we are of the view that the revised *Trustee Act* should emphasize that a trustee should not only exercise care and prudence in the selection and supervision of the agent, but also in relying upon the advice given by the agent. But, if the advice obtained seems satisfactory to the trustee on any reasonable basis, there seems no good reason why he should be concerned to obtain a second opinion. Accordingly, we recommend that trustees should not be liable for any loss to the trust if they rely reasonably and in good faith upon a written statement of an agent who is a duly accredited member of the legal, accounting, engineering, medical or any other profession.[114]

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[109] *Supra*, note 91.

[110] *Canada Business Corporations Act*, *supra*, note 59.

[111] *Ibid.*, s. 117.

[112] See, also, Ontario *Business Corporations Act, 1982*, *supra*, note 59, s. 47, which deals with reliance upon advice in the context of trusts for bondholders.

[113] The role of director is not only that of manager, but risktaker. He is engaged in a commercial venture. The trustee is more concerned with conserving, and minimizing risk.

(e) Power of Attorney

In England, section 25 of the *Trustee Act, 1925*, as amended in 1971,[115] enables a trustee to delegate any of his duties or powers by way of a power of attorney for a period not exceeding twelve months. The section provides as follows:

> 25.—(1) Notwithstanding any rule of law or equity to the contrary, a trustee may, by power of attorney, delegate for a period not exceeding twelve months the execution or exercise of all or any of the trusts, powers and discretions vested in him as trustee either alone or jointly with any other person or persons.
>
> (2) The persons who may be donees of a power of attorney under this section include a trust corporation but not (unless a trust corporation) the only other co-trustee of the donor of the power.
>
> (3) An instrument creating a power of attorney under this section shall be attested by at least one witness.
>
> (4) Before or within seven days after giving a power of attorney under this section the donor shall give written notice thereof (specifying the date on which the power comes into operation and its duration, the donee of the power, the reason why the power is given and, where some only are delegated, the trusts, powers and discretions delegated) to –
>
> (*a*) each person (other than himself), if any, who under any instrument creating the trust has power (whether alone or jointly) to appoint a new trustee; and
>
> (*b*) each of the other trustees, if any;
>
> but failure to comply with this subsection shall not, in favour of a person dealing with the donee of the power, invalidate any act or instrument executed by the donee.
>
> (5) The donor of a power of attorney given under this section shall be liable for the acts or defaults of the donee in the same manner as if they were the acts or defaults of the donor.
>
> (6) For the purpose of executing or exercising the trusts or powers delegated to him, the donee may exercise any of the powers conferred on the donor as trustee by statute or by the instrument creating the trust, including power, for

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[114] Draft Bill, s. 5(4).

[115] *Supra*, note 40, s. 25, as am. by *Powers of Attorney Act, 1971*, c. 27, s. 9(1) (U.K.). For the genesis of the amending Act, see The Law Commission, *Powers of Attorney*, Law Comm. No. 30, (Cmnd. 4473, 1970). See, also, Samuels, "Powers of Attorney Act 1971" (1971), 35 Conveyancer (N.S.) 310.

> the purpose of the transfer of any inscribed stock, himself to delegate to an attorney power to transfer but not including the power of delegation conferred by this section.
>
> (7) The fact that it appears from any power of attorney given under this section, or from any evidence required for the purposes of any such power of attorney or otherwise, that in dealing with any stock the donee of the power is acting in the execution of a trust shall not be deemed for any purpose to affect any person in whose books the stock is inscribed or registered with any notice of the trust.
>
> (8) This section applies to a personal representative, tenant for life and statutory owner as it applies to a trustee except that subsection (4) shall apply as if it required the notice there mentioned to be given –
>
> (*a*) in the case of a personal representative, to each of the other personal representatives, if any, except any executor who has renounced probate;
>
> (*b*) in the case of a tenant for life, to the trustees of the settlement and to each person, if any, who together with the person giving the notice constitutes the tenant for life;
>
> (*c*) in the case of a statutory owner, to each of the persons, if any, who together with the person giving the notice constitute the statutory owner and, in the case of a statutory owner by virtue of section 23(1)(*a*) of the Settled Land Act 1925, to the trustees of the settlement.

It will be seen that, under this section, notice of the delegation must be given within seven days to all those with the power to appoint new trustees, and to each of the co-trustees, although failure to do this does not invalidate any act entered into by the donee of the power of attorney with a third party. The English provision makes the donor of the power liable for the acts or defaults of the donee in the same manner as if they were the acts or defaults of the donor. The equivalent statutory power in New Zealand to delegate by power of attorney is different in this respect. Section 31(3) of the New Zealand *Trustee Act 1956*[116] does not impose liability for the agent's act or default if the donor can show that the donee was appointed by him in good faith and without negligence.

In England, the 1925 version of this power was limited in its exercise to those occasions where the trustee in question was out of the United Kingdom. Since 1971, however, the English legislation has not limited the circumstances in which the power may be exercised. This means that a trustee may delegate by way of power of attorney whenever it is reasonable and prudent to do so. The New Zealand power – the 1908 New Zealand power[117] was the first of its kind – still requires absence from the country, as do the equivalent provisions in the Trustee Acts of New South Wales, Victoria, and South Australia.[118] Queensland and Western Australia, however, also include trustees who are, or are about to become, temporarily incapable of performing all their duties by reason of physical infirmity.[119] The Manitoba[120] and New Brunswick[121] powers of delegation by way of grant of power of attorney are copies of the English 1925 power, having been adopted before the 1971 revision.

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[116] *Supra*, note 47.

[117] *Trustee Act, 1908*, Statutes N.Z. 1908, No. 200, ss. 103-05.

[118] Tasmania has no general power to delegate. For a full discussion of the Australian legislation, see Meagher and Gummow, *supra*, note 46, at 326-39.

We are of the view that the current English power of delegating by way of a grant of power of attorney would be of value in the revised *Trustee Act*. We are aware that there is evidence that the power was little used in England prior to 1971, but in part this explains the 1971 revision. We have in mind that there are always occasions when a trustee is temporarily unable to act, but neither needs nor wishes to resign. At present, he will probably appoint his co-trustee as his agent, but, as we have seen, if this is not authorized by the trust instrument, the extent of the purported delegation may not be proper on his part. Even if the appointment is authorized by the trust instrument, it is questionable whether the authorization of a total delegation of administrative and dispositive powers would be valid. It is interesting that the English power enabling the trustee to grant a power of attorney suggests that some limitation should be placed upon such a practice. Section 25(2) of the English Act does not permit a sole co-trustee, other than a trust corporation, to be the donee of a power of attorney.

We therefore propose the adoption of the English power, and we are of the view that the revised *Trustee Act* should make available an appropriate mode of temporary, partial, or total delegation by way of power of attorney. We do not recommend the New Zealand provision, which imposes liability on the delegating trustee for the defaults of the donee of the power of attorney only if the appointment was in bad faith or negligent. We can understand this concession to the trustee, but we do not think that statute, as opposed to a trust instrument, should go this far. The Manitoba, New Brunswick, and British Columbia sections all adopted and retain the English principle that the donor of the power of attorney is liable for the acts and omissions of the donee, as if they were his own,[122] and we think this policy is correct. After all, this is a provision authorizing total delegation. It should be for the trustee-donor, if appropriate, to require the donee of the power to enter into an administration bond, or for the trustee to insure himself against liability. The revised *Trustee Act* must be concerned with a proper protection of the trust beneficiaries.

Accordingly, we recommend, subject to certain qualifications discussed below, that a trustee should be able, by granting a power of attorney, to delegate to any person for any period not exceeding twelve months the execution or exercise of all or any of the duties and powers vested in him as sole trustee or jointly with one or more other trustees.[123]

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[119] *Trusts Act 1973*, Queensl. Stat. 1973, No. 24, s. 56, and *Trustees Act, 1962*, W. Austl. Acts 1962, No. 78, s. 54.

[120] *The Trustee Act*, *supra*, note 82, s. 38.

[121] *Trustees Act*, R.S.N.B. 1973, c. T-15, s. 6. The British Columbia *Trustee Act*, R.S.B.C. 1979, c. 414, s. 14, contains a power of delegation by way of grant of power of attorney, and it follows the model of the 1925 English power, except that it is restricted to that situation only where the trustee is engaged on war service, as defined by s. 13. See further, Waters, *supra*, note 1, at 752.

[122] *Supra*, notes 120 and 121. The English Law Reform Committee, *supra*, note 34, paras. 4.12-4.13, favours the retention of this liability.

The qualifications that we would place upon this power are as follows. First, a trustee should be able to delegate, by granting a power of attorney, only where the delegation would result in the duties and powers so delegated being executed or exercised by the donee and one or more other persons, except that, where the donee is a trust company, it should be able to act alone.[124] Secondly, an instrument creating a power of attorney should be attested by at least one witness.[125] Thirdly, within seven days after granting a power of attorney, the donor should give written notice thereof, specifying the date on which the power comes into effect, its duration, the name of the donee, the reason why the power of attorney is given, and the duties and powers delegated, to any other persons who have power, alone or jointly, to appoint a new trustee, and to any other trustees. However, failure to give such notice should not, in favour of a person dealing with the donee of the power, invalidate any act done or instrument executed by the donee.[126]

Concerning the liability of the donor, we recommend that he should be liable for the acts or defaults of the donee in the same manner as if they were the acts or defaults of the donor.[127]

Finally, we are of the view that two further provisions would be useful in relation to delegation by way of power of attorney. First, we recommend that the fact that it appears from a power of attorney given under the statute, or from any evidence required for the purposes of the exercise of any such power or otherwise, that the donee of the power is acting in the execution of a trust should not be deemed for any purpose to affect any person with notice of the trust.[128] Secondly, we recommend that a trust instrument should be able to exclude the power to delegate by way of power of attorney. However, if any trust instrument does confer a power to delegate by power of attorney, it should be done in the terms of the statute, and not otherwise.[129]

4. CONFLICT OF INTEREST AND DUTY

(a) NATURE AND SCOPE OF THE RULE

No fiduciary acting within the scope of his duties may utilize his position by making it a means of obtaining unauthorized profit for himself or any third party.[130] There are many persons whom the law considers to be fiduciaries. Generally speaking, a fiduciary is one who has the task of acting for the benefit of another, and who is entrusted with goods, office, or influence for that purpose. A trustee is not only a fiduciary, but, because his role is to preserve the trust property rather than choose among alternative business risks, which is the role of the company director and many other agents, the fundamental duties, of which the conflict rule is one, apply with their greatest intensity to the trustee.

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[123] Draft Bill, s. 8(1).

[124] *Ibid.*, s. 8(2).

[125] *Ibid.*, s. 8(3).

[126] *Ibid.*, s. 8(4).

[127] *Ibid.*, s. 8(5).

[128] *Ibid.*, s. 8(6).

[129] *Ibid.*, s. 8(7).

The rule in *Keech v. Sandford*,[131] an early decision that came to be associated with the prohibition against profiteering, is strict and uncompromising. The law is not concerned with the level of integrity of the trustee; that is irrelevant, even if the trustee demonstrates that the trust could not itself have acquired the benefit, or he protests what is in fact the truth, namely, that the only point of his actions was to benefit the trust beneficiaries, whatever profit may have incidentally come to himself. The only issue is whether the trustee was in a position where his interest could conflict with his duty to the trust when the profit or other gain was made, and "his interest" will include the situation where a stranger to the trust is to acquire the improper benefit. If such profit or benefit was obtained as a result of acts which, given his duties as set out in the trust instrument, or arising from oral instructions or the nature of the fiduciary task, would be associated on a reasonable construction with the performance by him of the trusteeship duties, the profit or gain must be surrendered.

Nor may a trustee allow himself to be placed in an ambiguous situation. If a situation exists where his own interests coincide with his duties to the trust, so that doubt could attach at a later date to his proclaimed reasons for pursuing a certain course of action or inaction, a trustee may not continue until a profit is made and a successful challenge is brought against him by a complaining beneficiary. He must rid himself of the personal interests that cause the conflict, or, if he is one of several trustees and his withdrawal from decision making by the trustees collectively is not possible,[132] he must resign.

As Lord Eldon stated on several occasions in explaining the strictness of the rule, the court cannot know what goes on in the mind of a man; it has no means of discovering what were his true motivations.[133] And the court should not be put in the position where it is asked to make such a decision. It is, of course, to prevent such conflict of interest situations that cabinet ministers have been required in recent years to put their private investments into so-called "blind trusts", where the minister is not aware, at any particular point in time, of the make-up of the portfolio of investments held by his trustees for his benefit. Without a required disposition of personal investments, or a "blind trust" arrangement, the concern is that the public may be suspicious of the true explanation of some ministerial decisions. As with the cabinet minister charged to conduct affairs on behalf of the public, so too with the trustee. The rule lifts every trustee above suspicion.

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[130] For a full account, see, further, *Lewin on Trusts*, *supra*, note 3, ch. 10; *Underhill's Law relating to Trusts and Trustees*, *supra*, note 3, at 544-52; and Waters, *supra*, note 1, at 618-55.

[131] (1726), Sel. Cas. T. King 61, 25 E.R. 223.

[132] The trust instrument will often entitle the trustee to withdraw from those matters in which he has a personal interest, requiring him only to lend his name formally to any decision (other than that which he knows or believes to be a breach) made by his co-trustees, so that their decision may be joint, as required by the law.

[133] *Ex parte Lacey* (1802), 6 Ves. Jun. 625, 31 E.R. 1228, and *Ex parte James* (1803), 8 Ves. Jun. 337, 32 E.R. 385.

However, the rule is not as Draconian as it may first appear. It does not condemn the acquisition of personal profits in all circumstances, as it well might, considering the serious nature of such conduct by a fiduciary. It merely demands that everything be "above board"; consent must have been given to the acquisition of gain by the trustee. It is therefore only unauthorized personal gain or advantage that the rule condemns, and that, if the profit is of the type that can be handed over, the rule will require the fiduciary to surrender it to the person for whose benefit he is acting.[134] Authority (or consent) permitting the trustee to be in a conflict situation may be given by the trust instrument, by the beneficiaries, or by the court.

So far as the trust instrument is concerned, the trustee may be authorized to retain a particular profit,[135] or to act as a trustee although he may have a competing interest.[136] It is most unlikely, although technically possible, that a trustee will be given a blanket authority to pursue his own interests even if conflict may occur. This is so patently unwise that few, if any, testators or settlors are likely to include such an authority, or be advised to confer such a *carte blanche* permission. The more likely position is that the testator or settlor either has no aversion to his trustee being in specified conflict situations,[137] or is prepared to tolerate specified conflicts in order to obtain the skill of the trustee or the familiarity of the trustee with the affairs of the settlor or testator. The most common authority in this regard is the charging clause, enabling a trustee to charge a fee to the trust for his services. Were it not for statutory intervention in each Canadian jurisdiction, including Ontario,[138] a trustee without a charging clause in the trust instrument, or an agreement with all the beneficiaries, assuming them to be adult and mentally capable, would be required to act gratuitously. The case law carries the conflict rule so far as this.[139]

If there is no authority in the trust instrument, a trustee may act in a conflict situation, and even take a profit for himself, provided that all the beneficiaries of the trust have consented before any profit was made. But all the beneficiaries must be ascertained, in the sense that all who could possibly benefit under the terms of the trust are alive,[140] and each must be adult and mentally capable. If these conditions are satisfied, the general trusts law principle that all the equitable owners together can effectively authorize the trustee to act in a manner that is contrary to the terms of the trust, or upon which the trust instrument is silent, comes into operation. The beneficiaries are the only persons with a right of action against the trustee for due and proper performance of the trust and, by consenting, provided it is a fully informed consent, they forego their right of action for breach.

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[134] An injunction would be appropriate where an advantage has been acquired enabling the trustee to make a future unauthorized profit.

[135] For example, a trustee may be authorized to loan his own moneys to the trust, and at a rate of interest to be fixed by himself.

[136] For example, the would-be trustee may be the majority shareholder in the company whose remaining shares are held by the trust for the deceased trust creator's family.

[137] For example, by purchasing trust assets at the going market price.

[138] *Trustee Act*, *supra*, note 48, s. 61.

[139] See Waters, *supra*, note 1, at 804-05.

Finally, consent to act in a conflict situation may be forthcoming from the court, exercising its inherent jurisdiction over trustees. Although there seems no reason why the courts could not exercise this jurisdiction regardless of how the conflict of interest and duty arises, it would seem that the courts have only been prepared to intervene in one specific situation, and that is where the trustee is a prospective purchaser of trust property. Why this situation alone should have received judicial attention is not clear. In any event, provided the trustee can show to the satisfaction of the court that it would be for the benefit of the incapacitated beneficiaries if the trustee were allowed to purchase, and no adult beneficiary objects, the court will, by order, consent on behalf of infant, unborn, or incapacitated beneficiaries. This jurisdiction has its roots in the nineteenth century,[141] but it would seem that the approval of the court can now be obtained in the abovementioned circumstances under the *Variation of Trusts Act*,[142] by way of an application to vary the terms of the trust. In an application under this Act, however, the court would be asked to approve the conferment upon the trustee of a power to purchase trust property; it would not merely be asked to consent to a particular purchase, as under the inherent jurisdiction.

The conferment of a power is a more difficult task for the court. Under the terms of the *Variation of Trusts Act*, the benefit of infants, incapacitated persons, and unborn persons must still be the deciding issue, but now the court must consider all the future conflicts that might arise and be authorized if the power were conferred upon the trustee. Nevertheless, the wording of the Act leaves us with little doubt that the Supreme Court of Ontario now has this statutory jurisdiction, and that the Court is able to approve the conferment of powers upon trustees whatever the nature of the conflict of interest and duty that has arisen.

There are therefore a number of ways in which the trustee may legitimately be able to continue in a conflict situation and, where it occurs, to retain any profit that he acquires. However, they do not provide for every circumstance. For one thing, the *Variation of Trusts Act* is not designed for the particular purpose of providing consents and varying trust terms to accommodate conflicts of interest. Moreover, practical problems may arise. The scrupulous trustee who wishes to act for the benefit of the trust, although in a manner that yields him a profit that is not authorized by the trust instrument, may find that there is either a single beneficiary who withholds his consent while all the others can and do consent, or that there are some beneficiaries who are minors or unborn and the problem does not concern a proposed trustee purchase of trust property.[143]

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[140] If there is a gift over from children to the next generation, the grandchildren, there may be further grandchildren who are not yet born.

[141] *Farmer v. Dean* (1863), 32 Beav. 327, 55 E.R. 128, and *Campbell v. Walker* (1800), 5 Ves. Jun. 678, 31 E.R. 801.

[142] *Variation of Trusts Act*, R.S.O. 1980, c. 519. This is also the view of *Underhill's Law relating to Trusts and Trustees*, *supra*, note 3, at 548-49.

Nor are these consent mechanisms an adequate barrier to the entry of the less scrupulous trustee into what he knows, or ought reasonably to know, is a conflict of interest and duty situation. Such a trustee, although having no recognizable intent to defraud, may find justification for saying nothing and seeking no one's approval for the profit he plans to acquire or has acquired. The justification may be that no beneficiary is losing anything he otherwise would have had, that the gain is fairly owed to the trustee for the effort he has expended on behalf of the beneficiaries, or even that the need to take advantage of a business opportunity that benefits the trust and the trustee does not afford the trustee the time to seek consents. He must presume that the beneficiaries would consent.

The trustee may also reflect that, in the particular circumstances, he might be able to argue successfully before a court that the profit was made while he was acting outside the scope of his trustee obligations, and he therefore gambles on "getting away with it".

Fraud, of course, be it legal or equitable, is a graver charge, and is an obvious breach of the conflict rule. The receipt of bribes or secret commissions, and the conversion of trust property to the trustee's own beneficial enjoyment, are examples of fraud. But a beneficiary who alleges such an intent and conduct is well advised to have an unanswerable case on the facts. Intent is not a necessary constituent element of conflict of interest and duty liability; a trustee must simply not be in a position where he could pursue his own advantage while engaged in his trustee tasks. It follows that any unauthorized profit acquired while he is in that position must be surrendered. Since an injunction and, if necessary, restitution can be obtained against a trustee who was innocent of any wrongful intent, the courts will demand clear proof from the beneficiary who seeks to reinforce his case by an allegation of intent to defraud.

The conflict rule therefore covers a spectrum of trustee conditions of mind, from the trustee who means well but makes an unauthorized profit, to the trustee who has thought about the matter but feels he is justified in what he is doing, to the trustee who is deliberately deceptive for his own or another's gain. There is also a wide range of factual situations where conflict of interest and duty can exist. All of them constitute a taking advantage of the trust property controlled by the trustee, or of the office of trusteeship. The trustee may have purchased, loaned, or simply used trust property for his own purposes. He may have sold or loaned his own assets to the trust. So far as his office is concerned, he may have used it to obtain bribes or commissions for the placing of contracts with third parties, or he may have exploited for himself business opportunities that rightly belong to the trust. Within these broad descriptions there are many different types of conduct and situation.

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[143] For example, the trust may have a substantial, but minority, shareholding in XYZ Ltd., which is under aging, poor management. The trust cannot afford to purchase more shares, but the company is a sound investment, and the trustee is prepared personally to buy sufficient shares. By this means the trust and he together constitute the majority shareholding, and the management problem would then be taken in hand. But see *Boardman v. Phipps*, [1967] 2 A.C. 46, [1966] 3 All E.R. 721 (H.L.).

(b) A Statutory Formulation of the Rule

We have asked ourselves whether the rule prohibiting a trustee from being in a conflict of interest situation, and, *a fortiori*, from deriving any personal profit from the situation, should be made statutory. The arguments concerning the codification of well established common law rules were canvassed in this chapter previously in the context of the duty of care.[144] We shall not reiterate those arguments here, except to say that, in a general sense, they are equally applicable in this context. Like the duty of care, the conflict of interest and duty rule is fundamental; it is vital that all accepting office should realize not only that the rule exists, but that it constitutes a total prohibition of the trustee even allowing himself to be in an ambiguous situation. If true trust can only exist where there cannot be a shadow of suspicion, and if it is a legal duty of the trustee to ensure that there can be no suspicion, then statute should bring this obligation to the attention of every trustee.[145] In addition, the revised *Trustee Act* could clarify certain of the attendant obligations imposed by the general rule, and provide an opportunity to alter those aspects of the rule that are no longer relevant in a modern trustee context.

We are persuaded by these arguments and believe that the conflict of interest and duty rule should be incorporated in the revised *Trustee Act*. Accordingly, we recommend that the revised *Trustee Act* should contain a provision to the effect that trustees shall discharge their duties and exercise their powers solely in the interests of the beneficiaries of the trust, and, without limiting the generality of this duty, they shall not knowingly permit themselves to be in a position in which their interest conflicts in any way with the discharge of their duties and the exercise of their powers, or in which they may derive any benefit for themselves or for any other person, except so far as the law or the trust instrument expressly permits.[146]

(c) Power of the Court in Relation to Conflict of Interest and Duty

It would appear that, if a judicial pre-consent procedure were available, many hard-fought conflict of interest and duty cases could be avoided. The

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[144] See *supra*, this ch., sec. 2(a).

[145] For a statutory formulation of the conflict of interest rule so far as it concerns trustees for bondholders and company directors respectively, see the Ontario *Business Corporations Act, 1982*, *supra*, note 59, ss. 48 and 132. See, also, the *Canada Business Corporations Act*, *supra*, note 59, s. 78 (trustee for bondholders), and s. 115 (company directors).

[146] Draft Bill, s. 9(1). As to the ability of the trust instrument to permit a conflict of interest and duty to exist, see further, *infra*, this ch., sec. 4(d). The reference to "so far as the law . . . expressly permits" is intended to preserve the applicability of case law that might permit trustees to act in a conflict of interest situation.

English case of *Boardman v. Phipps*[147] is an excellent example. In that case, a solicitor and a trust beneficiary, having no valid authority from the trustees, held themselves out to a third party as persons authorized to act on behalf of the trustees. On this basis, the solicitor and trust beneficiary acquired financial information from a company that would not otherwise have been available to them and, as a result of this information, purchased shares, securing a profit for themselves and the trust. The House of Lords, by a majority, held the solicitor and beneficiary subject to the conflict of interest and duty rule, and therefore liable to surrender to the trust beneficiaries the personal profit that they had made. The majority of the House of Lords was of the view that the solicitor and beneficiary, being intimately associated with the trustees, and having commenced to act as agents and fiduciaries on behalf of the trust, used that position to secure a personal profit; that is, they were acting throughout as fiduciaries of the trust. The minority of the House of Lords, on the other hand, took the view that the fiduciary relationship ceased before any plan to purchase the shares was commenced. Valid pre-consents to the proposed course of action might have proved a more productive route.

Section 5(b) of the American Uniform Trustees' Powers Act[148] provides that, if the duty of a trustee and his individual interest should come into conflict in the exercise of a trust power, he must obtain the authorization of the court by petition before exercising the power. This means that, where a conflict arises, a trustee is prohibited entirely from proceeding at all, or any further, with any power, unless he has the court's consent. We have asked ourselves whether the revised *Trustee Act* should impose a similar requirement upon trustees in this Province. Such a petition to the court might either be mandatory or facultative; in the latter case, the trustee would not be required to obtain the court's pre-consent, but the opportunity would be made available to him to explain to the court what advantages exist for the trust and its beneficiaries in his being allowed to proceed as he proposes.

The arguments in favour of a mandatory pre-consent requirement are based on the contention that it is better to prevent a fiduciary acting in a conflict situation than to demand accountability once the trustee has so acted and has derived a profit. In other words, it is preferable to impose the duty upon the trustee to secure consent before the act than to permit him to act and then defend himself against the beneficiary's charge that he acted while subject to a conflict of interest and duty. The reason for the preference is simple. First, once a trustee has acted in circumstances where his personal interest was, or could have been, involved, it is by no means easy at a later date to determine the extent of the impropriety. The evidence of motive is so often, as Lord Eldon remarked,[149] hidden within the breast of the fiduciary. Secondly, it is hard to impose upon the beneficiary the obligation to expose a conflict of interest and duty. The information about trust affairs that the trust beneficiary may demand is limited[150] and, in any event, he is likely to know little about the day to day business of the trust. The transactions that the trustees have concluded, and the source of the money and assets in their hands at any particular time, are matters of which very few beneficiaries will be, or could be, aware.

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[147] *Supra*, note 143. See, also, Waters, *supra*, note 1, at 647-49.

[148] *Supra*, note 91.

[149] *Supra*, note 133.

[150] It has been held that a beneficiary is not entitled to see the correspondence between trustees, or the minutes of their meetings: *Re Londonderry's Settlement*, [1965] Ch. 918, [1964] 3 All E.R. 855 (C.A.) (subsequent references are to [1965] Ch.).

This reasoning clearly convinced the National Conference of Commissioners on Uniform State Laws in the United States when it was deciding upon the text of the Uniform Trustees' Powers Act. Nonetheless, we are of the view that there is a major disadvantage to this approach, which we think is fatal. If a trustee were required to obtain the consent of the court every time he believed he could be in a position of conflict, the conduct of trust administration in today's circumstances might well be constantly arrested by applications to the court. Moreover, the court's lists could be heavily composed of such applications; conflict of interest and duty can occur in a myriad of ways, and he who fails to recognize such a conflict would, as a trustee, be continuing to act in breach of his statutory duty. It would be irrelevant whether or not he had personally profited, something which would be a mere exacerbation of his wrongdoing. He would have to secure the court's approval if he were to be sure of his position. We can see no justification for adopting a legislative provision that might have such an outcome; the cure could be worse than the ailment.[151]

Instead, we have pursued the question whether a facultative pre-consent jurisdiction would be advantageous. As we explained earlier, such a jurisdiction would offer a trustee the opportunity to explain to the court why it would be for the benefit of the trust and its beneficiaries that he proceed, even though he is in a conflict situation and may derive a personal profit. The trustee would have no duty to obtain this consent, but the opportunity would be there, whatever the nature of the conflict, if the trustee wished to avail himself of it.

An important factor favouring this approach is that the courts already have an inherent jurisdiction to consent to a trustee purchase of trust property, where it can be shown that, despite the potential conflict, such a purchase is of benefit to the trust.[152] The court consents on behalf of the infant, mentally incapacitated and unborn beneficiaries. A facultative pre-consent jurisdiction would merely be an application of this solution to any kind of conflict of interest situation. Moreover, the *Variation of Trusts Act* is itself a generalization of this same jurisdiction of the court to consent on behalf of the incapacitated and unascertained beneficiaries. Essentially, the facultative jurisdiction would allow an honest trustee to show his hand to the court and, if he obtains consent, proceed without fear of later challenge by any beneficiary.

The same facultative jurisdiction might also be made available to the trustee who knows or becomes aware of the fact that he has acted while in a conflict situation. The trustee could be permitted to apply to the court to be excused for his conduct. As the law stands, a trustee is entitled to ask the court to excuse him where he is sued by a beneficiary for breach of trust;[153] the jurisdiction we are now considering would allow the trustee to seek that relief without having to await an action for breach.

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[151] Although, admittedly, we could find no evidence that, in those states where the Uniform Trustees' Powers Act has been adopted, difficulties of this kind have arisen. See *supra*, note 91, for a list of those states that have adopted the Uniform Act.

[152] *Underhill's Law relating to Trusts and Trustees*, *supra*, note 3, at 548-49.

There are, however, several objections that can be made to even a facultative pre-consent jurisdiction. Almost all conflict of interest and duty cases come before the courts because a beneficiary challenges the trustee to show why the trustee should not be required to surrender an unauthorized profit that he has obtained. This means the trial takes place *after* the conflict has occurred and any profit has been made. In these circumstances, it is said, the court can assess exactly what form the conflict took and the significance the conflict had in the particular circumstances. Unlike the pre-consent jurisdiction, the court is not left to prognosticate what form the conflict may take in the future or what significance it may assume. The distinction between pre-consent and subsequent evaluation of trustee conduct where a challenge has been brought is important because, if consent is given, a later challenge will be almost impossible to launch.

Only where the trustee has not adhered to the terms of the consent, or the circumstances afterwards have changed, will a later challenge be a feasible proposition for any beneficiary. It is arguably much better that the sword of Damocles – that he will be sued – should hang over the head of a trustee who knows or suspects he is in a conflict situation than that he should secure a consent to proceed from a court, which must make an assessment largely upon the basis of such evidence as the trustee is willing to give the court concerning his own intentions and the advantages the future may offer him for the acquisition of personal profit.

While we readily concede that the conflict of interest and duty rule must be unambiguous in the demands it makes of the trustee, and that its enforcement must be predictable and sure, we have concluded that the existing inherent jurisdiction of the courts to consent to a trustee purchase should be extended by statute to cover all conflict situations. In our view, every encouragement and opportunity should be offered to the trustee to reveal the nature of any questionable position in which he finds himself. The scrupulous trustee, who is convinced that the best interests of the trust will be achieved by the course in which he also has a personal interest, will welcome the court's judgment on the propriety of his intended action.[154]

The less scrupulous trustee, it is true, will not take advantage of the statutory jurisdiction; he will continue to shun publicity concerning his activities. On the other hand, it must be a factor to be considered in any action subsequently brought by a beneficiary against the trustee that the latter did not seek the consent of the court, a procedure that was readily available to him.[155] This may provide evidence of the actual state of the trustee's mind at the crucial moment. Moreover, even if an unscrupulous trustee does seek consent, we do not envisage that the courts will lightly give their consent, or – though this has had no influence upon our decision – that there will be many successful applications.

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[153] *Trustee Act*, *supra*, note 48, s. 35. See, also, Draft Bill, s. 69, and *supra*, this ch., sec. 2(d).

[154] There will also be occasions where the trustee and the beneficiaries are agreed that for the trustee to act in a certain manner, or to possess a particular power, though a conflict of interest may arise, would be for the benefit of the trust: see, for example, *Re Lerner*, [1952] 4 D.L.R. 605, [1952] 6 W.W.R. 187 (Man. C.A.).

We are therefore of the view that the revised *Trustee Act* should contain a provision that would authorize the court to permit a trustee, either before or after he assumes office, to carry out his duties and exercise his powers, although he will be, or is, in a position of conflict of interest.[156] We would also confirm the power of the court to excuse the trustee from liability for a past breach of the conflict rule, such jurisdiction being available to the trustee on application. The safeguards that we would build into this provision are threefold: first, that the court should be entitled to impose such terms and conditions upon the trustee receiving consent or being excused as the court thinks fit; secondly, that all persons having any interest under the trust should receive notice of such applications;[157] and thirdly, that a trustee or beneficiary should be able on application to have the consent or excusing re-opened if there is afterwards a change of circumstances. It may be that the personal interest of a trustee who has received consent becomes more deeply involved as a consequence of later developments concerning the management of the trust, or that facts come to light that were not known or revealed when the court consented to the trustee's request. We would also have the provision apply to charitable trusts, provided notice of any intended application is given to the Public Trustee.

Accordingly, we recommend that, where upon application to the court it is shown that it would be for the benefit of the trust and its beneficiaries, whether or not any beneficiary withholds his consent, the court should be able to make an order, on such terms and conditions as appear just, permitting the trustees to act nothwithstanding that they may be in a position of conflict of interest and duty, or excusing them from liability notwithstanding that they may be in breach of trust for having acted while their interest was in conflict with their duty.[158] The latter jurisdiction of the court should be exercisable upon appliction of the trustees any time after the occurrence of the breach of trust; but nothing in this proposed power should affect in any way the powers of the court to excuse a trustee for breach of trust.[159]

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[155] Had the jurisdiction existed at the time of *Crocker and Croquip Ltd. v. Tornroos*, [1957] S.C.R. 151, 7 D.L.R. (2d) 104, the outcome might have been quite different: see Waters, *supra*, note 1, at 906-07. But see *Bloodworth v. Bloodworth*, 224 Ga. 717, 164 S.E.2d 823 (Sup. Ct. 1968).

[156] The California Civil Code, § 2232 (West), prohibits the trustee from acting at the same time as trustee of another trust with contrary interests, unless the beneficiaries of the first trust consent. The Indiana Trust Code, Ind. Stats. Ann., Code Ed., § 30-4-3-7 (Burns), also prohibits a trustee from dealing with himself as trustee of another trust, unless the instrument in question permits this, or the beneficiaries of both trusts, being fully informed of the facts, consent. We would leave matters such as this to the courts, acting under the jurisdiction we propose; an appropriate order can then be made, tailored to the particular circumstances.

[157] For example, the Official Guardian, in the case of minors and the unborn.

[158] Draft Bill, s. 9(2).

We further recommend that, unless otherwise ordered by the court, the trustees should give notice of the application to every person having any interest in the trust.[160] Where, however, a minor or unborn person has an interest in the trust, the trustees should also give notice of the application to the Official Guardian at least one month before the day fixed for the return of the application.[161] In addition, where an order has been made permitting a trustee to act in a conflict situation, and the circumstances under which it was made change, the court should be empowered, upon application by the trustees or any interested person, to vary the order.[162] We also recommend that the proposed procedure should apply to a charitable trust, in which case the trustees should give notice of the application to the Public Trustee at least one month before the day fixed for the return of the application.[163]

We have also noted and considered the fact that the American Uniform Trustees' Powers Act recognizes five exceptions to the general rule, contained in section 5(b), that, if his own interests are involved, a trustee may only exercise a trust power with the consent of the court. First, the trustee is permitted, without consent, to exercise the power to retain investments, though he is personally interested in the investments in question.[164] For instance, a corporate executor and trustee may retain investments in the estate of the deceased, although they constitute shares in the corporate trustee. We are of the view that such a trustee should have consent, either from the beneficiaries or, on its own application, from the court, if it wishes to be free of any later accusation of retaining investments for its own direct or indirect benefit.

Secondly, a trustee is permitted under the American Uniform Act to acquire an undivided interest in property in which the trust holds the other interest.[165] We are of the view that this is a sufficiently rare occurrence, and that the dangers arising from this conflict are so similar to those arising from other conflict situations that this exception should not be adopted.

Thirdly, section 3(c)(6) of the Uniform Act permits a trustee to deposit trust funds in a bank, including a bank operated by the trustee. We can understand the convenience behind this exception, and, given the protection afforded depositors by the provisions of the *Canada Deposit Insurance Corporation Act*,[166] we are of the view that this situation should be recognized as an exception to the general conflict of interest and duty rule. However, out of an abundance of caution, we are of the view that a trustee should only be permitted to deposit trust funds in its own banking facilities or to invest in its own securities up to the limit established by the *Canada Deposit Insurance Corporation Act*. We would also emphasize that this power would only be available to a trust company, or other depository empowered by law to accept moneys for deposit, that is acting as trustee, and not to an individual or other non-authorized corporate trustee, unless, of course, the trust instrument expressly so provides. Equally, the trust instrument could prohibit its trustees from depositing and investing trust funds in their own institutions.

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[159] *Ibid.*, s. 9(3).

[160] *Ibid.*, s. 9(4).

[161] *Ibid.*, s. 9(5).

[162] *Ibid.*, s. 9(7).

[163] *Ibid.*, s. 9(6).

[164] Uniform Trustees' Powers Act, *supra*, note 91, § 3(c)(1).

[165] *Ibid.*, § 3(c)(4).

[166] R.S.C. 1970, c. C-3, s. 13(1), as am. by S.C. 1980-81-82-83, c. 148, s. 3, which amends paragraph 13(1)(*c*) by raising the insurable limit to $60,000. The amending Act, except ss. 4 and 7, came into force on April 21, 1983. The insurable limit, by virtue of s. 9, is deemed to have come into force on January 4, 1983.

Accordingly, we recommend that, subject to our later recommendation concerning the deposit of trust funds,[167] and to any power in the trust instrument, a trust company or other depository empowered by law to accept moneys for deposit should be able to deposit or invest the funds vested in it pursuant to a trust of which it is a trustee in any account maintained, or in any security issued, by itself or any affiliate or subsidiary up to, but not exceeding, the maximum insurable sum established by the *Canada Deposit Insurance Corporation Act*.[168]

Fourthly, under the American Uniform Trustees' Powers Act, the trustee has a lien on the trust property or against the beneficiary for the moneys out of his own pocket that he has spent as outgoings in the administration of the trust.[169] A trustee in Ontario, of course, has a statutory entitlement to reimbursement for all proper expenditures on behalf of the trust, and, alternatively, the statute permits him to pay or discharge expenses directly out of the trust property.[170] We believe that this provision should be retained in the revised *Trustee Act*, and we would merely move it to that part of the Act that is concerned with the conflict of interest and duty rule. Accordingly, we recommend that a power in a trust instrument authorizing the trustees to reimburse themselves or to make payments directly from the trust funds for the discharge of expenses or of any other obligation properly incurred or arising in the administration of the trust should be valid and that the trustees should not be regarded as acting in conflict of interest and duty in so doing.[171]

Fifthly, the American Uniform Act provides that a trustee may employ agents, even if they are associated with the trustee, to advise and assist him, and that he may act without independent investigation upon their recommendations.[172] As we have previously considered this provision and have made recommendations concerning the ability of a trustee to rely upon the advice of qualified agents,[173] we need say no more here. However, the freedom of a trustee to employ the services of his partner, or a subsidiary or affiliate, is another issue. It is probable that lawyers and accountants would associate the conflict of interest and duty rule with bribes and other illicit commissions, and not with the hiring of partners to carry out trust work within the areas of those partners' respective skills, even though this practice will result in the trustee profiting through his share in the partnership gains. We have concluded nevertheless that there is no justification for taking this situation out of the ambit of the conflict of interest rule. This is the very kind of conflict with which the judicial pre-consent jurisdiction that we have proposed should be dealing. There may be good reasons why the trustee wishes to employ his partner, intimate knowledge of the agent's skill being the foremost, but we think these reasons should be adjudicated upon by the court, if the trust instrument is silent on the matter. In this, as in every other matter, the trustee should be above and beyond the situation where suspicion of personal gain could arise.

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[167] See *infra*, ch. 4, sec. 3(d)(i), and Draft Bill, s. 35(*a*).

[168] Draft Bill, ss. 10 and 35(*a*).

[169] Uniform Trustees' Powers Act, *supra*, note 91, § 3(c)(18).

[170] *Trustee Act*, *supra*, note 48, s. 33. See, further, Waters, *supra*, note 1, at 795-804.

[171] Draft Bill, s. 11.

[172] Uniform Trustees' Powers Act, *supra*, note 91, § 3(c)(24).

[173] Draft Bill, ss. 5, 6, and 7. See *supra*, this ch., sec. 3(d).

(d) VALIDITY OF TERMS IN THE TRUST INSTRUMENT PERMITTING A CONFLICT OF INTEREST AND DUTY

Trust instruments often contain clauses expressly permitting an act or acts that otherwise would be voidable for breach of the conflict of interest and duty rule. Executors and trustees are authorized to loan moneys for trust administration, both to the deceased's estate and to and from each other, for instance, and they are enabled to charge such rate of interest as they decide. Trustees may also be enabled to purchase any part of the trust property, and on such terms, including unsecured credit, as they choose. On occasion, words will be added stating that no trustee making such a purchase shall be required to obtain the consent of the court.

Settlors and testators may have various reasons for adopting such clauses. Tax planning considerations will explain the power given to executors and trustees of a will to loan moneys to the testator's estate, and, if the trustee is a member of the testator's family, it is likely that the testator will also wish to confer benefits upon him. Such benefits may take the form not only of direct gifts, but of the authority to acquire or deal with the trust property for his personal advantage.

On the other hand, we have some doubts whether those who create trusts always appreciate the significance of these clauses in the sense of the antagonisms they can create between the trustee and the beneficiaries. In some instances, the meaning itself may not be properly understood. The settlor or testator, particularly the latter, may be ill-advised to appoint as an executor or trustee a person whom he also intends to benefit, that is, to confer fiduciary powers upon the executor or trustee, and then authorize the fiduciary to exercise such power for his personal gain.

The positions that the revised *Trustee Act* might take on this issue are several. It might prohibit the exclusion of the conflict of interest rule as to any trustee behaviour, and thus render void any act of a trustee that is in breach of the prohibition, save insofar as a *bona fide* third party purchaser for value without notice is concerned. Alternatively, the revised Act might prohibit the exclusion of the rule in certain types of trust, for instance, real estate investment trusts. Thirdly, the revised Act might prohibit the exclusion of the rule in relation to certain kinds of conflict of interest and duty behaviour, such as the right of the trustee to borrow from the trust for himself, on personal security and interest free. The thinking behind such a prohibition would be that it is in the remuneration clause, and not in the fiduciary powers of administration, that a trustee should enjoy the benefaction of the testator or settlor. Fourthly, the revised *Trustee Act* might prohibit any exclusion of the right of the beneficiary to apply to the court to determine whether a conflict permitted by the trust instrument should prevail. Finally, the revised Act might remain silent on the matter, as the present Act now does.

Although there are good reasons for protecting beneficiaries from misguided or misunderstood exclusions of the conflict rule, we have concluded that they do not justify the adoption in the revised *Trustee Act* of any of the first three alternatives. We are therefore able to this extent to allow force to be given to the declared intent of the settlor or testator.

As between the fourth and last alternatives, the legislature appears already to have made a choice in the enactment of the *Variation of Trusts Act*.[174] While we have been unable to trace a reported instance in which the court has been asked to approve an arrangement under that Act whereby a clause permitting a conflict of interest and duty has been varied or deleted, we can see no limitation on the language of that Act that would prevent the court from giving such an approval in the case of a trust involving unborn, incapacitated, or unascertained beneficiaries. In such a case, it would appear that a settlor or testator cannot oust the jurisdiction of the court by seeking to exclude the right of the beneficiary to seek the approval of the court to a variation or deletion of a term in the trust instrument.

In our view, all beneficiaries, whether or not some or all of them are incapacitated, should be able to apply to the court for a variation or a deletion of a term in the trust instrument permitting a trustee to act in a conflict of interest situation.[175] Moreover, because of the potentially prejudicial effect that the operation of such terms might have on the beneficiaries, the trust instrument should not be able to prevent beneficiaries from applying to the court. Accordingly, we recommend that, notwithstanding the terms of the trust instrument, any beneficiary of a trust should be able to apply to the court for a deletion or variation of any term in the trust instrument permitting a conflict of interest and duty.[176]

As for those trusts that are conducted as investment or other business vehicles by professional trustees for investing members of the public, or consortia of businessmen and corporations, it will be recalled that we recommended in Chapter 1 of this Report that such trusts should not be subject to the revised Act. It is our view that any regulation of such trusts, if regulation is desirable, should be carried out by specific legislation, such as consumer protection legislation, rather than by general legislation such as the revised *Trustee Act*.

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[174] *Variation of Trusts Act*, *supra*, note 142. See *infra*, ch. 7, sec. 2(a), for a discussion of the *Variation of Trusts Act*.

[175] The *Variation of Trusts Act*, *supra*, note 142, only applies where some or all of the beneficiaries seeking a variation of a term of the trust are incapacitated. At present, there is some controversy whether beneficiaries who are all capacitated can vary the terms of the trust, as opposed to terminating the trust prematurely, under the common law rule of *Saunders* v. *Vautier* (1841), 4 Beav. 115, 49 E.R. 282, aff'd Cr. & Ph. 240, 41 E.R. 482; see *infra*, ch. 7, sec. 2(b)(ii).

[176] Draft Bill, s. 12(1).

5. UNANIMITY OF TRUSTEES

In the previous parts of this chapter, we have discussed the three fundamental duties of trustees that we consider should be contained in the revised *Trustee Act*. At this stage, we wish to deal with an issue that, although not constituting a fundamental duty, is a general principle that governs trustees in the exercise of their powers and discharge of their duties, the so-called "rule of unanimity". At present, case law requires trustees to act unanimously in the exercise of their powers.[177] If a trustee refuses to join with his co-trustees in the exercise of a trust power, a deadlock results.

In the event of a deadlock, the courts may remove one or more of the trustees if there is such hostility that the administration of the trust is brought to a standstill and if the interests of the beneficiaries are suffering or are likely to suffer.[178] Further, in certain circumstances of deadlock, Ontario courts have sometimes been willing to settle the issue by the exercise of their powers under section 60 of the *Trustee Act* to give direction on a question "respecting the management or administration of the trust property".[179] However, in a situation of deadlock, this provision is of limited utility. The reason is that the exercise of a trust power involves essentially the exercise of a discretion vested by the trust instrument or the legislation in the trustees, and the courts traditionally have refused to interfere with the exercise of discretion by trustees.[180] Accordingly, in order for the court to exercise its power under section 60, it must be clear that trustees are in disagreement about whether or not to exercise a certain power. If they are agreed that a power should be exercised, such as the power of sale, but disagree about the circumstances in which they should exercise the power – for example, they are unable to agree on the acceptance of a particular offer to purchase[181] – it appears that Ontario courts will not resolve this disagreement by issuing a direction under section 60 of the *Trustee Act*.

The question that arises is whether the unanimity rule should be carried over to the revised *Trustee Act*. An alternative approach is suggested by the

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[177] See Waters, *supra*, note 1, at 612.

[178] *Ibid*., at 594-95.

[179] See, for example, *Re Haasz*, [1959] O.W.N. 395, 21 D.L.R. (2d) 12 (C.A.), and *Re Billes* (1983), 42 O.R. (2d) 110, 148 D.L.R. (3d) 512.

[180] See Waters, *supra*, note 1, at 753-59.

[181] See *Re Wright* (1977), 14 O.R. (2d) 698, 74 D.L.R. (3d) 504 (H.C.J.).

Quebec Civil Code[182] and the American Uniform Trustees' Powers Act,[183] each of which provides that trustees may act by a majority. Enquiries we have made indicate that Ontario trust lawyers are divided on the matter. Some support the majority rule on the grounds of convenience, while others oppose it as an invitation for dissension.

In the opinion of the Commission, this issue is a significant one, and it has received our careful attention. As we have noted, the unanimity rule now prevails in Ontario and, so far as we can ascertain, has not given rise to undue difficulties. Further, adoption of the majority rule would inevitably weaken the protection that trust beneficiaries now enjoy, without conferring upon them any compensating benefit. In the result, we have concluded that no case has been made for change in the present law. We consider that the rule of unanimity should be continued, and in view of its importance should be placed in legislative form. Accordingly, we recommend that the revised *Trustee Act* should contain a provision to the effect that, in the discharge of their duties and the exercise of their powers, whether the duties or powers are created by law or the trust instrument, trustees must act unanimously.[184] Of course, it would still be open to a testator or settlor, should he so choose, to modify this provision and adopt the majority rule by an express statement in the trust instrument. Moreover, where it appears that the trustees are unable to achieve unanimity on a matter, we recommend that one or more of them should be able to apply to the court for an order resolving the deadlock in any way it considers proper.[185]

We would note that this recommendation renders it unnecessary for the Commission to consider the implications that adoption of the majority rule would have upon the law regarding liability of trustees for breach of trust, and upon the law of indemnification and contribution among trustees.

6. POWERS OF TRUSTEES SOLELY THEIRS

In the preceding sections of this chapter, we have been concerned with the fundamental duties and principles that should govern trustees in the exercise of their powers and discharge of their duties. We now turn to consider whether the revised *Trustee Act* should contain any similar general principles governing the activities of beneficiaries *vis-à-vis* the trust and its trustees. In particular, we have given thought to the extent to which beneficiaries should be permitted to be involved in the administration of the trust, and the recourse that should be available to them if they do not approve of the manner in which the trustees are conducting the affairs of the trust, apart from suit for breach of trust. The first issue we shall examine is whether beneficiaries should be able to instruct trustees concerning the exercise of their powers. Secondly, we turn to whether trust beneficiaries should have the means to oppose the trustees' intended exercise of any power.

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[182] "Gifts Inter Vivos and by Will of Trusts", art. 981f, provides that "[w]hen there are several trustees, the majority may act, unless it be otherwise provided in the document creating the trust".

[183] American Uniform Trustees' Powers Act, *supra*, note 91, § 6(a) and (c) provides as follows:

> 6. (a) Any power vested in 3 or more trustees may be exercised by a majority, but a trustee who has not joined in exercising a power is not liable to the beneficiaries or to others for the consequences of the exercise; and a dissenting trustee is not liable for the consequences of an act in which he joins at the direction of the majority of the trustees, if he expressed his dissent in writing to any of his cotrustees at or before the time of the joinder.
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> 6. (c) This section does not excuse a cotrustee from liability for failure either to participate in the administration of the trust or to attempt to prevent a breach of trust.

[184] Draft Bill, s. 13(1).

[185] *Ibid.*, s. 13(2).

(a) SHOULD BENEFICIARIES BE ENTITLED TO INSTRUCT TRUSTEES IN THE EXERCISE OF THEIR POWERS?

It has been asserted that the power of beneficiaries to intervene in the affairs of the trust should be broad, and, in particular, that they should be able to instruct trustees concerning the exercise of their powers. The basis for this assertion lies in an extension of the principle set forth in *Saunders v. Vautier*.[186] It was established by this case that, if the sole possible beneficiary of a trust is ascertained, of age, and mentally capable, that person can call upon trustees to transfer the trust property to him, even though the terms of the trust permit payment or transfer to take place only at a later time. In these circumstances, equity regards the beneficiary as the absolute owner and the trust as a restraint upon his enjoyment with which he may dispense as he sees fit. Equity also employs the same analysis when there is more than one possible beneficiary.[187] Accordingly, it is contended that, if the circumstances are such that beneficiaries may direct trustees to wind up the trust, they should also, in like circumstances, be able to keep the trust in being and instruct the trustees concerning the exercise of their powers.

This issue has arisen on two specific occasions, and has received two varying responses. The orthodox view was expressed in *Re Brockbank*,[188] a case where a continuing trustee wished to exercise his statutory power of appointment by appointing a trust corporation as his co-trustee, while the beneficiaries wanted an individual appointed co-trustee. The Court pointed out that under the *Trustee Act, 1925* the power to appoint a substitute trustee was conferred upon the continuing trustee, and that he was proposing to exercise his discretion properly. The application was dismissed, and the Court noted that, if the beneficiaries wished the individual appointed, their remedy was to wind up the trust and to resettle, appointing new trustees. A different opinion was expressed in *Butt v. Kelson*,[189] a decision of the English Court of Appeal. In this case, trustees, registered as owners of certain shares that were trust property, were held to have the obligation to vote the shares as instructed by the beneficiaries. The Court reasoned that, as the trust beneficiaries were entitled to call for the shares, they were entitled to say how the trustees should use their vote.[190]

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[186] *Saunders v. Vautier*, *supra*, note 175.

[187] For example, assume a trust in favour of A for life, then to B for life, and then to C in remainder. During A's lifetime, A, B, and C, if they are all ascertained, of age, and mentally capable, may agree and call for the capital from the trustees, in order that it may be divided among themselves.

[188] [1948] Ch. 206, [1948] 1 All E.R. 287. See, also, *Underhill's Law relating to Trusts and Trustees*, *supra*, note 3, at 556.

[189] [1952] Ch. 197, [1952] 1 All. E.R. 167 (C.A).

Neither case appears to have been invoked in any reported Canadian decision, and we are of the view that the matter should be settled in the revised *Trustee Act*. We would note that the right of beneficiaries to direct trustees in the exercise of their powers is not without statutory expression. The Western Australia *Trustees Act, 1962*[191] contains a provision that requires trustees to sell land subject to a trust, if the person or all the persons beneficially entitled to an interest in possession express the desire in writing that they do so. Nonetheless, for several reasons we are inclined to the view expressed in *Re Brockbank*.

First, it is the trustees in whom the trust property is vested. The settlor or testator has placed property in trust for specific reasons, and has entrusted to persons whom he views as capable the power to make decisions that will be in the best interests of the trust. To allow beneficiaries to direct the ongoing administration of the trust confuses the roles of trustee and beneficiary and is inconsistent with the trust concept. If the creator of the trust wishes a beneficiary to be actively involved in the management of the trust, such person may always be appointed trustee. Further, beneficiaries are granted several remedies, which should protect them adequately against imprudent actions by trustees.

Finally, we mentioned earlier that the basis for the assertion that beneficiaries should be able to instruct trustees concerning the exercise of their powers lies in an extension of the principle in *Saunders v. Vautier*. In a later chapter of this Report,[192] we recommend that all *Saunders v. Vautier* trust terminations should require the consent of the court. If this recommendation is accepted, it follows, in our opinion, that the basis for this assertion will no longer exist. Accordingly, we recommend that the revised *Trustee Act* should provide that, subject to the power of delegation, and notwithstanding that all the beneficiaries are ascertained, of age, and under no disability, the powers conferred upon trustees by the Act or by the trust instrument, or as a result of their having title to trust property, should be exercisable by them solely within their own discretion.[193]

(b) Beneficiaries' Objection to Trustees' Exercise of Powers

The recommendation that we have made in the preceding section makes it clear that beneficiaries should not be able, on an ongoing basis, to instruct trustees concerning how the terms of the trust should be administered. Nonetheless, the question arises whether beneficiaries should have some means available to oppose a trustee's intended exercise of power, and, if so, whether the remedies that are available to beneficiaries at present are adequate in this regard.

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[190] In *Re Whichelow Ld.*, [1954] 1 W.L.R. 5, at 8, [1953] 2 All E.R. 1558 (Ch.D.), at 1561, Upjohn J. pointed out that *Butt v. Kelson* "is difficult to reconcile" with *Re Brockbank*, *supra*, note 188, *Re Higginbottom*, [1892] 3 Ch. 132, and *Tempest v. Lord Camoys* (1882), 21 Ch. D. 571 (C.A.). It seems that *Re Brockbank* was not brought to the Court's attention in *Butt v. Kelson*.

[191] *Trustees Act, 1962*, *supra*, note 119, s. 27(4).

[192] See *infra*, ch. 7.

[193] Draft Bill, s. 14.

For example, suppose that a testamentary trust is created and that the trust assets include an old house. Suppose also that the trust is in favour of a person who is a minor when the will takes effect, and that it is to continue until the minor attains the age of majority. Suppose further that the trustees intend to accept an attractive offer to purchase the house either because the trust requires funds or because they judge the cost of outgoings to be reducing unjustifiably the original dollar value of the testamentary gift. In this situation, should the parent or guardian of the minor, on his behalf, be able to challenge the proposed sale of the house by the trustees?

It may be argued that, although the trustees may act responsibly and in good faith in exercising their discretion, the beneficiary could make a case in the above-noted situation. The house may have been the home of the grandparents of the minor, and there may be sentimental reasons for retaining the property, despite its poor showing as an investment proposition. Similar types of problem could arise with other powers. Under a power contained in the trust instrument to carry on a business, for example, trustees might decide that the best course would be to sell the business, while the beneficiaries might prefer, for their own reasons, to see the business continued.

To meet this type of situation, the New Zealand *Trustee Act 1956*,[194] the Western Australia *Trustees Act, 1962*,[195] and the Queensland *Trusts Act 1973*[196] supplement a beneficiary's case law remedies by conferring upon him the right to bring his argument before the court. Section 8 of the Queensland Act, which is modelled upon and is in similar terms to the New Zealand and Western Australia provisions, provides as follows:

> 8.—(1) Any person who has, directly or indirectly, an interest, whether vested or contingent, in any trust property, and who is aggrieved by any act, omission or decision of a trustee or other person in the exercise of any power conferred by this Act or by the instrument (if any) creating the trust, or who has reasonable grounds to apprehend any such act, omission or decision by which he will be aggrieved, may apply to the Court to review the act, omission or decision, or to give directions in respect of the apprehended act, omission or decision; and the Court may require the trustee or other person to appear before it, and to substantiate and uphold the grounds of the act, omission or decision which is being reviewed and may make such order in the premises (including such order as to costs) as the circumstances may require.
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> (2) An order of the Court under subsection (1) shall not –
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> (a) disturb any distribution of the trust property, made without breach of trust, before the trustee became aware of the making of the application to the Court; or

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[194] *Supra*, note 47, s. 68.

[195] *Supra*, note 119, s. 94.

[196] *Supra*, note 119, s. 8.

(b) affect any right acquired by any person in good faith and for valuable consideration.

(3) Where any application is made under this section, the Court may, –

(a) if any question of fact is involved, determine that question or give directions as to the manner in which that question shall be determined; and

(b) if the Court is being asked to make an order which may adversely affect the rights of any person who is not a party to the proceedings, direct that that person shall be made a party to the proceedings.

As will be noted, the Act permits any person who is aggrieved "by any act, omission or decision of a trustee . . . in the exercise of any power" to apply to the court for relief; the trustee may then be required to give reasons for the act, omission, or decision in issue. Although beneficiaries have always had recourse against trustees for a breach of trust, this provision appears to reverse case law that has held that there is no duty imposed upon trustees, in the absence of bad faith, to disclose their motives or reasons for the manner in which they have exercised a particular power.[197] The Act also provides that any distribution of the trust property made without breach of trust, and before the trustees became aware of the application to the court, shall stand, and extends this protection to any third party who has acquired a right in good faith and for valuable consideration.

It may be contended, however, for several reasons, that it would be inappropriate to confer upon beneficiaries, or those acting on their behalf, an opportunity to oppose trustees in the exercise of their powers; that is, to grant beneficiaries what may be described as a "blocking power". First, it is the trust instrument that provides trustees' instructions and authorities, with the *Trustee Act* powers supplementing the instrument. Trustees are, by the instrument, vested with legal ownership of the trust assets and, accordingly, are entitled to act as if they were the owners; for example, trustees may contract in their own name. Therefore, it would be inconsistent with the principles of trusteeship to require trustees to justify their decisions, or proposed actions, concerning the administration of the trust at the behest of a beneficiary who may be contrary minded.

Moreover, the controls upon trustees in the discharge of their duties and the exercise of their powers constitute the fundamental obligations of trustees: namely, to demonstrate "vigilance, prudence and sagacity";[198] to avoid conflicts of interest and duty; to delegate only those matters that do not involve crucial policy; and, where there are both income and capital beneficiaries, to exercise their powers in such a way that they favour neither the one nor the other.[199] Where one or more of these obligations have not been honoured, the remedy available to the aggrieved beneficiary is an action for breach of trust, or, where breach of trust is apprehended, an injunction to prevent the conduct at issue. But, according to this argument, where these obligations have been satisfied, a beneficiary should not have a blocking power; he should not be able to arrest a course of action that trustees have determined to be appropriate.

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[197] See *Re Londonderry's Settlement*, *supra*, note 150, at 928, *per* Harman L.J.

[198] *Fales*, *Wohlleben v. Canada Permanent Trust Co.*, *supra*, note 5.

[199] See *infra*, ch. 4, sec. 4, for a discussion of the duty to act impartially.

Secondly, it can be asserted that trustees may be reluctant to take decisions that they believe to be in the best interests of the trust, or even to act as trustees, if, for their efforts, they may be brought before the courts to justify their decisions on the merits. In addition, the delay that may occur as a result of judicial proceedings under a blocking power may result in the loss of an opportunity that the trustees should have pursued and that would have benefited the trust. It has also been noted that beneficiaries are rarely unanimous concerning a proposed course of action, and that one beneficiary should not be permitted by means of a blocking power to disrupt and delay the administration of the trust that is being carried out by the trustees in the best interests of all the beneficiaries.

Thirdly, it may be said that the introduction of a blocking power might have serious implications for trustees dealing with third parties. Third parties who deal in good faith with trustees should be able to rely upon the fact that trustees have the ability to carry through transactions into which they enter, and that such transactions will not be set aside subsequently at the behest of beneficiaries. Trustees' powers will be of little value if ordinary commercial significance does not attach to their purported exercise.

Finally, it may be asked what principles a court should apply in assessing the appropriateness of a decision taken by trustees, and what remedies should be available. It is argued that the court should not be asked to review a situation and to provide a solution where, for example, trustees contend that a prudent man of business would sell trust property, while an aggrieved beneficiary with a remainder interest replies that he would like the property retained.

The Commission finds the above arguments compelling, and has concluded that a beneficiary who takes exception to a trustee's exercise of power should not able to apply to the court for a review of the trustee's decision in the absence of a breach of trust by the trustee. Such a position would come precariously close to affording beneficiaries an opportunity to instruct trustees concerning the exercise of their powers, a proposition that we rejected in the previous section of this chapter.[200] As we stated there, the powers conferred upon trustees by statute or by the trust instrument, or as a result of their having title to trust property, should be exercisable by them solely within their own discretion.[201] To permit beneficiaries to question the trustees' exercise, or proposed exercise, of discretion in the absence of an alleged breach of trust would, in our opinion, undermine this principle greatly.

Generally speaking, we agree with the present position that a court should not interfere with the *bona fide* exercise of discretion by trustees. The one exception to this general principle is where trustees who must act unanimously cannot agree, in which case we have recommended that the court should be empowered to break the deadlock by whatever means appropriate, including the exercise of discretion of the trustees.[202] The proposed blocking power would appear to contemplate a much broader role for the court in reviewing the exercise of trustees' discretion, if the power were to be meaningful. If, on the other hand, notwithstanding the existence of a blocking power, courts were reticent to intervene in trustees' exercise of powers to any greater extent than contemplated by the present law, such a blocking power would be of minimal utility. Indeed, it would appear that the courts in Queensland have adopted a cautious approach to the application of section 8(1) of the *Trusts Act 1973*. In the two reported cases dealing with this section, the courts were of the view that there was a very heavy onus upon the person who sought to review a trustee's decision and that the court should not interfere lightly with a discretionary decision of a trustee unless a proper case had been made out.[203]

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[200] See *supra*, this ch., sec. 6(a).

[201] See Draft Bill, s. 14.

While we are of the opinion that a power akin to that provided in section 8 of the Queensland *Trusts Act 1973* should not be introduced in Ontario, it has been pointed out to us that it would be useful to specify the remedies available to beneficiaries where the trustees refuse to act, in the sense that they refuse to discharge a duty or to turn their minds to whether they should exercise a power. At present, of course, beneficiaries may seek to have a trustee who refuses to act removed from office.[204] However, this course of action may not be attractive for various reasons; all that may be needed is a direction from the court that the trustees proceed in a timely fashion to exercise their powers and discharge their duties. The court would not, in these circumstances, be empowered to instruct the trustees how to act. Rather, where a proper case of inactivity on the part of the trustees had been made out, the court would direct that the trustees discharge the duty or turn their minds to the exercise of the powers that have been conferred upon them. If the trustees demonstrate that they have, in their discretion, considered the matter, and have decided on a particular course of conduct that might include inactivity, the court, in the absence of an allegation of breach of trust, would not generally interfere with the exercise of discretion by trustees.

We are aware that under the present case law beneficiaries, through their equitable interest, can "compel the trustees to discharge their fiduciary role in relation to the powers and duties which they possess".[205] This, of course, is especially the case where a trustee fails to carry out his duties as prescribed by the trust instrument, statute, or otherwise by law.[206] We are also of the view that, even if what is involved is a power, beneficiaries should be able to compel trustees to exercise their discretion under the power, but not, as we have said, to the extent of dictating the manner in which the discretion shall be exercised. Accordingly, we recommend that the revised *Trustee Act* should contain a provision to the effect that, where trustees are directed or empowered to act, whether by the trust instrument, statute, or otherwise by law, and they refuse or fail to discharge the duty or to consider in good faith and decide accordingly upon the exercise of the power, the court, upon application by a beneficiary, may order the trustees to discharge the duty, or to satisfy the court that such consideration has been given to the exercise of the power.[207]

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[202] See *supra*, this ch., sec. 5, and Draft Bill, s. 13(2).

[203] See *Re Koczorowski*, [1974] Qd. R. 177 (S.C.), and *Re Whitehouse*, [1982] Qd. R. 196 (S.C.).

[204] See *infra*, ch. 3, secs. 1(b) and (f).

[205] See Waters, *supra*, note 1, at 835.

[206] *Ibid.*, at 837-40.

RECOMMENDATIONS

The Commission makes the following recommendations:

1. The revised *Trustee Act* should set out expressly the general duty of care governing the exercise of power and discharge of duty by trustees. Accordingly, the revised *Trustee Act* should provide that, in the discharge of their duties and the exercise of their powers, whether the duty or power is created by law or the trust instrument, trustees shall exercise that degree of care, diligence, and skill that a person of ordinary prudence would exercise in dealing with the property of another person.

2. Non-professional, unremunerated trustees should not be governed by any lower standard of care than that set out in Recommendation 1. That is, non-professional, unremunerated trustees should be governed by the general duty of care expected of all trustees as expressed in Recommendation 1.

3. "Professional" trustees, that is, trustees who in fact possess, or who because of their profession, business, or calling ought to possess, a particular level of knowledge or skill which in all the circumstances is relevant to the administratrion of the trust, should employ that particular level of knowledge or skill in the administration of the trust, in addition to the general duty of care applicable to all trustees as provided in Recommendation 1.

4. Section 35 of the present *Trustee Act*, permitting the court to excuse trustees for breach of trust, should be carried over to the revised *Trustee Act*. Accordingly, the revised Act should provide that, if in any proceedings affecting a trustee or trust property it appears to the court that a trustee, or any person who may be held to be fiduciarily responsible as a trustee, is or may be personally liable for a breach of trust, whenever the transaction alleged or found to be a breach of trust occurred, but has acted honestly and reasonably and ought fairly to be excused for the breach of trust, and for not obtaining the directions of the court in the matter in which he committed the breach, the court may relieve the trustee either wholly or partly from personal liability for the breach.

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[207] Draft Bill, s. 16.

5. The revised *Trustee Act* should contain a provision to the effect that no term in a trust instrument, or in an oral declaration of trust, is valid to the extent that it purports to exonerate the trustees from liability for failure to exercise the degree of care, diligence, and skill that a person of ordinary prudence would exercise in dealing with the property of another person.

6. The revised *Trustee Act* should provide that no term in a trust instrument, or in an oral declaration of trust, should be valid to the extent that it purports to exclude or lower the standard of knowledge or skill required by trustees who in fact possess, or who because of their profession, business, or calling ought to possess, a particular level of knowledge or skill which in all the circumstances is relevant to the administration of the trust.

7. Section 20 of the present Ontario *Trustee Act* should be repealed. In its place, the revised *Trustee Act* should provide that, where it is reasonable and prudent in the circumstances so to do, trustees may employ one or more persons as agents within or outside Ontario to carry out any act required to be done in the administration of the trust, including the execution of documents, the payment, transfer, and receipt of money or other property, and the giving of discharges for receipts, but excluding the exercise of any express or statutory discretion as to the transfer or distribution of trust property to or among beneficiaries of the trust.

8. The revised *Trustee Act* should provide that, for the purpose of the power of delegation proposed in Recommendation 7, an agent includes a co-trustee. A non-corporate trustee should be able to delegate, to the extent permitted by Recommendation 7, to the other trustees where there are two or more non-corporate trustees, or to a sole co-trustee if the sole co-trustee is a trust company, but, except where a sole trustee was originally appointed, where there are two trustees only and neither is a trust company, neither should be able to delegate to the other.

9. The revised *Trustee Act* should provide that, in employing an agent, trustees shall personally select the agent and be satisfied of his suitability to perform the act for which he is to be employed, and shall carry out such supervision of the agent throughout his employment as is prudent and reasonable.

10. The revised *Trustee Act* should provide that no term in a trust instrument, or in an oral declaration of trust, is valid to the extent that it purports to absolve the trustees in the employment of agents from the duty to act in accordance with Recommendation 9.

11. The revised *Trustee Act* should provide that trustees are only chargeable for loss caused by the default of an agent if the loss is due, wholly or partly, to a breach of the duties prescribed by Recommendations 7 and 9, or otherwise to the trustees' negligence or wilful wrongdoing.

12. The revised *Trustee Act* should provide that trustees are not liable for any loss to the trust if they rely reasonably and in good faith upon a written

statement of an agent who is a duly accredited member of the legal, accounting, engineering, medical or any other profession.

13. The revised *Trustee Act* should provide that a trustee may, by granting a power of attorney, delegate to any person for any period not exceeding twelve months the execution or exercise of all or any of the duties and powers vested in him as sole trustee or jointly with one or more other trustees.

14. The power of delegation by way of power of attorney proposed in Recommendation 13 should be subject to the following limitations in the revised *Trustee Act*:

    (a) a trustee should be able to delegate by granting a power of attorney only where the delegation would result in the duties and powers so delegated being executed or exercised by the donee and one or more other persons, except that where the donee is a trust company, it should be able to act alone;

    (b) an instrument creating a power of attorney should be attested by at least one witness; and

    (c) within seven days after granting a power of attorney, the donor should give written notice thereof, specifying the date on which the power comes into effect, its duration, the name of the donee, the reason why the power of attorney is given, and the duties and powers delegated,

        (i) to any other persons who have power, alone or jointly, to appoint a new trustee; and

        (ii) to any other trustees,

    but failure to comply with this requirement should not, in favour of a person dealing with the donee of the power, invalidate any act done or instrument executed by the donee.

15. The revised *Trustee Act* should provide that the donor of a power of attorney given under Recommendation 13 is liable for the acts or defaults of the donee in the same manner as if they were the acts or defaults of the donor.

16. The revised *Trustee Act* should provide that the fact that it appears from a power of attorney given under Recommendation 13, or from any evidence required for the purposes of the exercise of any such power or otherwise, that the donee of the power is acting in the execution of a trust shall not be deemed for any purpose to affect any person with notice of the trust.

17. The revised *Trustee Act* should provide that a trust instrument may exclude the power to delegate by way of power of attorney under Recommendation 13, but that, if any trust instrument does confer a power to

delegate by way of power of attorney, it must done in the terms of Recommendations 13 to 16, and not otherwise.

18. The revised *Trustee Act* should state expressly the duty of trustees with respect to the conflict of their own interests and their duties to the trust. Accordingly, the revised Act should provide that trustees shall discharge their duties and exercise their powers solely in the interests of the beneficiaries of the trust, and, without limiting the generality of this duty, shall not knowingly permit themselves to be in a position in which their interest conflicts in any way with the discharge of their duties and the exercise of their powers, or in which they may derive any benefit for themselves or for any other person, except so far as the law or the trust instrument expressly permits.

19. The revised *Trustee Act* should provide that, where upon application to the court it is shown that it would be for the benefit of the trust and its beneficiaries, whether or not any beneficiary withholds his consent, the court may make an order, on such terms and conditions as appear just,

    (i) permitting the trustees to act notwithstanding that they may be in a position of conflict of interest and duty, or

    (ii) excusing them from liability notwithstanding that they may be in breach of trust for having acted while their interest was in conflict with their duty.

20. The revised *Trustee Act* should provide that the jurisdiction of the court is exercisable in cases under Recommendation 19(ii) upon application by the trustees any time after the occurrence of the breach of trust; but nothing in this recommendation should affect in any way the power of the court under Recommendation 4 to excuse a trustee for breach of trust.

21. The revised *Trustee Act* should provide that, unless otherwise ordered by the court, the trustees shall give notice of an application under Recommendation 19 to every person having any interest in the trust.

22. The revised *Trustee Act* should provide that, where a minor or unborn person has an interest in the trust, the trustees shall also give notice of an application under Recommendation 19 to the Official Guardian at least one month before the day fixed for the return of the application.

23. The revised *Trustee Act* should provide that, where an order has been made permitting a trustee to act in a conflict of interest situation, and circumstances under which it was made change, the court may, upon application by the trustees or any interested person, vary the order.

24. The revised *Trustee Act* should provide that Recommendation 19 applies to a charitable trust, in which case the trustees must give notice of the application to the Public Trustee at least one month before the day fixed for the return of the application.

25. The revised *Trustee Act* should provide that, subject to our later recommendation concerning the deposit of trust funds and to any power in the trust instrument, a trust company, or other depository empowered by law to accept moneys for deposit, may deposit or invest the funds vested in it pursuant to a trust of which it is a trustee in any account maintained, or in any security issued, by itself or any affiliate or subsidiary up to, but not exceeding, the maximum insurable sum established by the *Canada Deposit Insurance Corporation Act*.

26. The revised *Trustee Act* should provide that a power in a trust instrument authorizing the trustees to reimburse themselves or to make payments directly from the trust funds for the discharge of expenses or of any other obligation properly incurred or arising in the administration of the trust is valid and that the trustees are not to be regarded as acting in conflict of interest and duty in so doing.

27. The revised *Trustee Act* should contain a provision to the effect that, notwithstanding the terms of the trust instrument, any beneficiary of a trust may apply to the court for a deletion or variation of any term in the trust instrument permitting a conflict of interest and duty.

28. The revised *Trustee Act* should provide that, in the discharge of their duties and the exercise of their powers, whether the duties or powers are created by law or the trust instrument, trustees must act unanimously, unless the terms of the trust instrument are to the contrary.

29. The revised *Trustee Act* should provide that, where it appears that the trustees are unable to achieve unanimity on a matter, one or more of them may apply to the court for an order resolving the deadlock in any way it considers proper.

30. Subject to the power to delegate proposed in Recommendations 7 and 13, and notwithstanding that all the beneficiaries are ascertained, of age, and under no disability, the powers conferred upon trustees by the revised Act or by the trust instrument, or as a result of their having title to trust property, should be exercisable by them solely within their own discretion.

31. The revised *Trustee Act* should provide that, where trustees are directed or empowered to act, whether by the trust instrument, statute, or otherwise by law, and they refuse or fail to discharge the duty or to consider in good faith and decide accordingly upon the exercise of the power, the court, upon application by a beneficiary, may order the trustees to discharge the duty or to satisfy the court that such consideration has been given to the exercise of the power.

CHAPTER 3

APPOINTMENT AND DISCHARGE OF TRUSTEES

In former decades, when social conditions were different and the levy of tax less, an express trust, whether created by a will or by a deed, could well remain in existence for many years, possibly spanning the lives of two or more generations. Today, in Canada, there are relatively few such trusts, although most trusts will probably be in operation for several years. Indeed, the lifespan of an average modern trust is probably between five and twenty years.[1]

During the period of a trust's existence, the trustees[2] are continually managing the trust property, which today usually consists of a portfolio of investments. The trustees periodically renew the trust property by a process of purchase and sale, and pursuant to the terms of the trust instrument pay out income or transfer portions of capital to the beneficiaries. The final act is the transfer of the remaining capital to those persons entitled on the termination of the trust. So far as the trustees are concerned, an express trust is, indeed, ongoing fiduciary management.

One of the main objectives of statutory provisions in the area of trust law is to facilitate efficient management of the trust. Throughout the life of the trust, the trustees are required to make important decisions concerning the administration of the trust. Accordingly, if during the existence of the trust a trustee dies, wishes to retire, or the removal of a trustee is required, questions arise concerning the statutory provisions that should be available to ensure that such events and their consequences do not unnecessarily disrupt the ongoing management of the trust. Furthermore, there is the question whether, in order to enable persons to discharge their duties as trustees effectively, a statutory limit should be imposed on the number of trustees who may hold office at any one time.

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[1] However, where provision is made for spendthrifts or for mentally incapacitated younger persons, the duration of the trust might be significantly greater than twenty years.

[2] Whether created by will or *inter vivos*, a trust may have one trustee acting alone, or two or more trustees, as the creator of the trust may choose. In Ontario, the trustee acting alone may be an individual, but more often the sole trustee is a trust corporation. When two or more trustees are acting together, they hold title to trust assets as joint tenants and must act jointly, although in both circumstances the creator of the trust may provide to the contrary. As between trustees, therefore, the right of survivorship applies. Because there may be several trustees, it is usual to refer to them in the plural.

The Commission understands that the statutory non-judicial powers of appointment and discharge of trustees[3] are rarely employed in Ontario. Rather, as a matter of practice, application to the court is the more frequent means of appointing and discharging trustees because, at present, it is the only method that assures the validity of appointment and the vesting of trust property. Consistent with the position taken by the reformers in England in 1925, the Commission is of the view that judicial application in this area, involving time and expense to the trust, should be discouraged, and that non-judicial appointment and discharge of trustees should be encouraged. In order to be utilized effectively, however, the non-judicial appointment and discharge mechanism must be relatively simple and provide, as nearly as possible, the same assurances that are obtained by a court order. Therefore, the Commission is of the opinion that the revised *Trustee Act* should contain non-judicial appointment and discharge powers that may be easily invoked and upon which reliance may be placed as to the validity of appointment, the vesting of trust property, and the proper exercise of powers conferred upon trustees.

In this chapter, the Commission considers four major issues relating to the appointment and discharge of trustees: first, whether the provisions of the Ontario *Trustee Act* relating to the retirement, removal, and appointment of trustees are satisfactory, including the question whether it is appropriate to place a statutory limitation on the number of trustees who may administer a trust at any given time; secondly, the protection that should be afforded a third party against improperly appointed trustees; thirdly, the evidence that should be available to a third party in order to determine whether trust property has been vested in trustees when a change of trusteeship occurs; and fourthly, the protection that should be afforded a third party against trustees acting outside the scope of their powers.

1. THE STATUTORY POWERS OF RETIREMENT, REMOVAL, AND APPOINTMENT OF TRUSTEES

During the lifespan of a trust, some trustees may wish to retire because of age, illness, or other calls upon their time. Others may become unfit to act and incapable of recognizing their inability to continue to discharge their obligations satisfactorily, while others may die in office. A trust corporation as trustee will not suffer from human ailments, but there still may be occasions when the corporation wishes to withdraw from its trusteeship, or the beneficiaries have a case for the removal of the corporation as trustee. Therefore, there will be numerous circumstances necessitating a mechanism whereby the retirement or removal of trustees can be effectuated and substitute or additional trustees appointed to the office.

If there is a trust instrument, which is almost always the case, relief may be obtained by utilizing the mechanism that may be contained in the instrument. An event may occur, however, that the instrument does not contemplate. To the extent that the instrument is silent, the position is the same as if the instrument had made no provision for retirement, removal, or appointment of trustees. In these circumstances, whether there is no power or an inadequate power, the remaining trustees or, if there are none, the beneficiaries, would have to turn to the court for assistance. For its part, the court has an inherent jurisdiction to ensure that no trust suffers for want of trustees[4] or of satisfactory trustees. Consequently, a judicial remedy is available, although, today, the inherent jurisdiction is rarely invoked. During the second half of the nineteenth century, Parliament in England began to reduce much of the court's inherent jurisdiction to statutory form, including that aspect of the jurisdiction now in question.[5] The inherent jurisdiction was not abolished; it was merely overlaid with a more clearly defined and precise statutory set of judicial powers. This legislation was adopted in various forms throughout Canada, Australia, and New Zealand.[6] At present, the provisions governing the judicial removal and appointment of trustees in Ontario are contained in section 5 of the *Trustee Act*.

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[3] *Trustee Act*, R.S.O. 1980, c. 512, ss. 2 and 3.

Application to the court, however, involves expense to the trust, delay, and inconvenience, all of which could be avoided if trustees could retire, be removed and appointed without the assistance of the court. The nineteenth century reformers appreciated this, and a non-judicial power of removal by the appointment of substitute trustees was first introduced in England in 1860 by *Lord Cranworth's Act*.[7] This non-judicial power was improved by the *Conveyancing and Law of Property Act, 1881*,[8] but the 1860 power had already been adopted in Ontario in 1877,[9] and has remained substantially unchanged since that time, appearing now as section 3 of the *Trustee Act*.[10] In addition, section 2 of the Ontario Act contains a non-judicial retirement power, whereby a trustee may retire without the intervention of the court.[11] In this event, the trust would be left in the care of the remaining trustees.[12] Alternatively, where a trustee desires to retire, he may be discharged and replaced by the appointment of a substitute trustee under section 3 of the Act.

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[4] The validity of a trust is not affected by the lack of a trustee, as no trust fails for want of a trustee: see *Guaranty Trust Co. of Canada v. Minister of National Revenue*, [1967] S.C.R. 133, 60 D.L.R. (2d) 481.

[5] *The Trustee Act, 1850*, 13 & 14 Vict., c. 60, s. 32 (U.K.). This Act, and *The Trustee Act, 1852*, 15 & 16 Vict., c. 55, s. 9 (U.K.), set up the statutory judicial powers. See, now, *Trustee Act, 1925*, 15 & 16 Geo. 5, c. 19, s. 41 (U.K.).

[6] See, now, for example, the Ontario *Trustee Act, supra*, note 3, s. 5; *The Trustee Act*, R.S.M. 1970, c. T160, s. 11; *Trustee Act 1956*, Repr. Stat. N.Z. 1977, No. 61, s. 51; *Trustees Act, 1962*, W. Austl. Acts 1962, No. 78, s. 7; and *Trustee Act, 1925*, Pub. Acts N.S.W., Vol. 11, No. 14, s. 70.

[7] *An Act to give to Trustees, Mortgagees, and others certain Powers now commonly inserted in Settlements, Mortgages and Wills* (1860), 23 & 24 Vict., c. 145, s. 27 (U.K.), commonly known as *Lord Cranworth's Act*. The statute was intended to confer upon all trusts a power that was already familiar in well-drawn trust instruments.

[8] *Conveyancing and Law of Property Act, 1881*, 44 & 45 Vict., c. 41, s. 31 (U.K.).

[9] The first statutory non-judicial appointment power was introduced in Ontario by *An Act to provide for certain amendments of the Law* (1877), 40 Vict., c. 8, s. 30.

[10] Section 3 is subject to a contrary intent expressed in the trust instrument: see the *Trustee Act, supra*, note 3, ss. 67-68, and *infra*, this ch., sec. 1(b).

[11] For the history of this section, see notes 20 and 21, *infra*, and accompanying text. Section 2 is also subject to the expression of a contrary intent in the trust instrument: see the *Trustee Act, supra*, note 3, ss. 67-68, and *infra*, this ch., sec. 1(a).

[12] *Trustee Act, supra*, note 3, s. 2.

However, unless there is a vacancy created by the death, retirement, or removal of a trustee, thereby bringing section 3 into play, the Ontario Act does not authorize an increase in the number of trustees by the non-judicial appointment of additional trustees,[13] a statutory power that is available in England.[14]

The first issue that arises is whether the nineteenth century statutory provisions, still in force in Ontario, are adequate, comprehensive, and clear. Other Commonwealth jurisdictions have thought not and have amended their Trustee Acts. The Commission has examined the trustee legislation of the provinces and territories of Canada, as well as the trustee legislation of the six Australian states, New Zealand, and Northern Ireland.[15] As a rule, these jurisdictions have amended their Trustee Acts in order to bring their legislation into line with or improve upon the provisions of the English *Trustee Act, 1925*.

The Commission recommends that, like these other Commonwealth jurisdictions, Ontario should retain, in an amended and improved form, the statutory non-judicial powers of retirement without replacement and replacement or removal by the appointment of a substitute trustee.[16] It will be convenient to consider the issues raised by this recommendation under eight headings: namely, (1) the position where a trustee retires non-judicially and is not replaced; (2) the position where a trustee is removed non-judicially by the appointment of a substitute trustee; (3) the position where a trustee is removed non-judicially without the appointment of a substitute trustee; (4) the liability of former and continuing trustees; (5) the power to appoint additional trustees non-judicially; (6) the power of the court to remove, replace, and appoint trustees; (7) the number of trustees who should be permitted to hold office at any one time; and (8) the supplementary provisions applicable to both non-judicial and judicial discharge and appointment of trustees.

(a) NON-JUDICIAL RETIREMENT WITHOUT REPLACEMENT

Although there has been a judicial suggestion that the court might prevent a trustee from retiring if there were no person who could replace him,[17] it is an accepted conclusion from the cases that no trustee will be compelled to continue in an office from which he wishes to withdraw.[18] Although a trustee cannot avoid liability for breach of trust by retiring, and will be liable if he retires in order to facilitate a breach by a co-trustee,[19] neither of these propositions denies him the right to retire.

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[13] Section 3(1) of the *Trustee Act* authorizes the appointment of "other persons" to be substitute trustees on the occurrence of a vacancy, a provision reinforced by s. 6(*a*), which permits the number of trustees to be increased on the appointment of a new trustee. See, also, *infra*, this ch., sec. 1(e).

[14] In Ontario, unless there is an express power in the instrument to appoint additional trustees, an application to the court would be required under s. 5 of the *Trustee Act*. In England, see the *Trustee Act, 1925*, *supra*, note 5, s. 36(6).

[15] All the Canadian common law provinces and territories, except Prince Edward Island and New Brunswick, have an equivalent of s. 3 of the Ontario *Trustee Act* (*i.e.*, a non-judicial power of removing and replacing trustees), and all, except Alberta, have some equivalent of s. 2 (a non-judicial retirement power without replacement). New Zealand, together with Tasmania, Victoria, New South Wales, South Australia, and Western Australia – Queensland being the only Australian exception – also have similar sections. The tradition in the states of the United States, however, is to utilize express powers and judicial powers.

[16] Draft Bill, ss. 19-25.

[17] *Courtenay v. Courtenay* (1845-46), 3 Jo. & La T. 519, 9 Ir. Eq. Rep. 329. The Court,

A trustee can only effectively retire, however, if he retires in a manner permitted by law. The trust instrument may include a provision permitting resignation. Alternatively, if there is no such provision, the court has an inherent jurisdiction to make an order permitting a trustee to resign. Section 2 of the Ontario *Trustee Act* is the third procedure available. Section 2(1) provides as follows:

> 2.—(1) Where there are more than two trustees, if one of them by deed declares that he desires to be discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, consent by deed to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee who desires to be discharged shall be deemed to have retired from the trust, and is, by the deed, discharged therefrom under this Act without any new trustee being appointed in his place.

Under this section a trustee can retire without being replaced and without the consent of the court, provided his co-trustees and any person with the power under the instrument to appoint new trustees consent by deed to his request. The deed constitutes the discharge of the retiring trustee. As will be seen, however, the section requires that at least two trustees must remain after the retirement.

Section 2 has its origin in the English *Conveyancing and Law of Property Act, 1881*,[20] and was introduced in Ontario in 1911 by *The Trustee Act*.[21] Since that time, the section appears to have proved generally satisfactory in operation. Section 2 requires the consent of the retiring trustee's "co-trustees and such other person, if any, as is empowered to appoint trustees". The prime consideration when a trustee wishes to retire should be the effect of his

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however, said that the trustee should not suffer thereby. Clearly his *right* was to retire on wishing to do so.

[18] See *Forshaw v. Higginson* (1855), 20 Beav. 485, 52 E.R. 690. In contrast to this attitude towards trustees, the courts in England and in common law Canada will not generally permit an executor to be discharged, either under the terms of the will or judicially, until the deceased person's estate has been wound up: see Mowbray (ed.), *Lewin on Trusts* (16th ed., 1964), at 406-07. This approach is reflected in s. 2(2) of the Ontario *Trustee Act*, *supra*, note 3. It is interesting to note that American courts have taken the view that a trustee may not retire where this would prejudice the interests of the trust beneficiaries: see Scott, *The Law of Trusts* (3d ed., 1967), § 106.1, at 837 *et seq*. Also, in this regard, Quebec's Civil Code Revision Office, *Report on The Québec Civil Code* (1977), Vol. 1, Book 4, Title 6, ch. 5, recommends that an administrator, which includes a trustee as a person entrusted with full administration of the property of others, should be responsible for any damage caused by his unjustified resignation.

[19] *Lewin on Trusts*, *supra*, note 18, at 664 *et seq*.

[20] *Supra*, note 8, s. 32.

[21] (1911), 1 Geo. 5, c. 26, s. 3.

retirement upon the security of the trust property and the sound administration of the trust. If this is so, it seems eminently sound that, unless the trust instrument otherwise provides, a trustee should not be permitted to retire where one or more of the persons whose consent is required withholds such consent.[22] In the event that the required consents are withheld, the trustee desiring to retire would have to apply to the court under its inherent jurisdiction. The Commission recommends that this aspect of section 2, requiring the consent of "co-trustees and such other person, if any, as is empowered to appoint trustees", should be carried over to the revised Act, and our Draft Bill so provides.[23]

The Commission is of the view, however, that minor improvements to the section are necessary. First, section 2(1) provides for the case where there are "more than two trustees" and "one of them . . . desires to be discharged". Therefore, this subsection cannot be utilized where the retirement would reduce the number of trustees below two. The equivalent section in the English *Trustee Act, 1925*[24] permits retirement if, after the discharge, there will be either a trust corporation or at least two individuals to act as trustees to perform the trust. These are also the criteria required for the discharge of a trustee who is to be replaced under section 3 of the Ontario *Trustee Act*.[25] There seems to be no reason why a trust corporation should not be able to act as sole trustee upon a section 2 retirement as well. Accordingly, we recommend that the revised Act should permit non-judicial retirement without replacement where there would remain either a trust company or at least two individual trustees to act as trustees.[26]

The Commission also considered the question whether retirement should be permitted non-judicially where only one individual trustee would remain in office. However, an original appointment of two or more trustees by the creator of the trust would appear to indicate, in the absence of a contrary intention in the instrument, an intention that more than one person should act as trustee. Moreover, an individual trustee may not have the facilities of, or be subject to the controls imposed upon, a trust corporation.[27] Accordingly, we are not attracted to the proposition that non-judicial retirement should be allowed where only one individual trustee would remain in office. We do recognize, nevertheless, that there may be occasions where it would be desirable to have only one individual trustee remain in office. In the view of the Commission, however, the consent of the court should be sought for the continuation of an individual as the only trustee in these circumstances. Under the revised Act this could be accomplished pursuant to the broad judicial power to remove a trustee that we later recommend,[28] which contains no statutory limitation with respect to the minimum number of trustees.[29]

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[22] The requirement for consents meets some of the Quebec and American concerns that a trustee should not retire at a time or in circumstances that would prejudice the interests of the trust beneficiaries: see note 18, *supra*.

[23] Draft Bill, s. 25(1).

[24] *Trustee Act, 1925*, *supra*, note 5, s. 39.

[25] See s. 6(*c*) of the *Trustee Act*, *supra*, note 3, and *infra*, this ch., sec. 1(g)(ii).

[26] Draft Bill, s. 25(1).

[27] See, for example, the *Loan and Trust Corporations Act*, R.S.O. 1980, c. 249.

Secondly, section 2(l) speaks only of a trustee desiring to be discharged "from the trust", and this would appear to prevent a retirement from a part of the trust, even where separate trust assets are held on distinct trust terms. Assume, for instance, that land is held by A, B, and C on trust for X for life, remainder to Y in fee simple, and that under the same trust instrument certain securities are held by the same trustees on trust for P for life, remainder to Q absolutely. There seems to be no reason why C should not be able to retire from the trust of the land, but remain as a trustee of the securities. This is permitted by the *Trustee Act (Northern Ireland), 1958*,[30] and there is a provision in the Ontario *Trustee Act* to the same effect when a new trustee is being appointed.[31] As a general principle, we agree with the concept of separate trustees for distinct trust assets. Accordingly, we recommend that a trustee should be able to retire non-judicially, without the appointment of a substitute trustee, from a part of the trust and remain as trustee of the other part or of other parts, provided that the parts of the trust reflect separate property held on distinct trust terms.[32]

Thirdly, section 2 contains no provision that would preclude the trust instrument from excluding the operation of the statutory powers contained in the section. Since the Ontario Act takes effect subject to the expression in the trust instrument of a contrary intent,[33] it is presumably possible, unless in any respect the Act expressly denies effect to a contrary intent, for the creator of the trust to oust this section. The observable policy of the case law is that no one should be compelled to continue as a trustee if he desires to retire.[34] The Commission agrees with this policy and, accordingly, recommends that nothing in a trust instrument should withhold from a trustee the right to retire from the trust or a part thereof, and that any such provision should be invalid for all purposes.[35] We would point out that if the creator of the trust wishes that a certain power or powers should be exercisable only by a particular trustee, he can provide that the power or powers are personal to that trustee. The effect of such a provision will be that the power or powers will lapse with the retirement and discharge of the trustee.

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[28] See *infra*, this ch., sec. 1(f), and Draft Bill, s. 56.

[29] See *infra*, this ch., sec. 1(g)(ii).

[30] *Trustee Act (Northern Ireland), 1958*, 6 & 7 Eliz. 2, c. 23, s. 38.

[31] *Trustee Act*, *supra*, note 3, s. 6(*b*). See, also, *infra*, this ch., sec. 1(h).

[32] Draft Bill, ss. 22 and 25(1).

[33] *Trustee Act*, *supra*, note 3, ss. 67 and 68.

[34] See *supra*, notes 17 and 18. If there were an application to the court in these circumstances, the court would be torn between the intention of the settlor or testator on the one hand, and the right of the trustee, established by the cases, to retire if he so desires, on the other hand. There is no apparent precedent on this issue; possibly the trustee's right to retire would prevail by virtue of the analogy to *Lumley v. Gye* (1853), 2 El. & Bl. 216, 118 E.R. 749. However, in their report on "The Trustee Law of Canada", *Canadian Bar Association Proceedings* (1926), at 236 *et seq.*, the Committee on Comparative Provincial Legislation and Law Reform of the C.B.A. for the Canadian Uniformity of Legislation Commissioners thought it necessary to submit, at 346, that "a trustee should be permitted to retire whether a contrary intention is expressed in the trust deed or not".

[35] Draft Bill, s. 25(2). It may also be noted that the Manitoba *Trustee Act*, *supra*, note 6, contains a similar provision in s. 9(1).

Before concluding our discussion of this issue, we would note the argument that the creator of the trust should be able to make the requirements for retirement more onerous than are otherwise provided by statute; for example, by providing in the instrument that no resignation is possible without the approval of the court. The concern is that a skilled and knowledgeable trustee may retire in an irresponsible manner, leaving the management of the trust, including the power to appoint new trustees, in the control of two or more less skilled and knowledgeable trustees. On balance, we do not consider the argument sufficiently persuasive. In the opinion of the Commission, the case law governing retirement and the general duty imposed upon trustees to manage the trust with the skill and prudence of a reasonable man of business[36] are deterrents to irresponsible behaviour. Further, the argument challenges the entire concept of non-judicial retirement. Therefore, the Commission is of the view that proffered retirements should be left, as recommended, to the discretion of the parties designated in the section, who are free to withhold their consents, thus requiring an application to the court by the trustee desiring to retire. Accordingly, we recommend that the creator of the trust should not be able to make the requirements for retirement more onerous than otherwise provided by statute, and that any such provision should be invalid for all purposes.[37]

(b) NON-JUDICIAL REPLACEMENT OR REMOVAL BY APPOINTMENT OF SUBSTITUTE TRUSTEES

Apart from retirement under section 2 of the *Trustee Act*, a trustee can be replaced or removed by a non-judicial, as distinct from a judicial, act under the provisions of section 3.[38] Section 3 reflects the nineteenth century English version of the power, which originated in *Lord Cranworth's Act*.[39] In England, the statutory power was further developed in the *Conveyancing and Law of Property Act, 1881*,[40] reproduced in its developed form in the *Trustee Act, 1893*,[41] and, finally, revised in section 36 of the *Trustee Act*,

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[36] See, for example, *Learoyd v. Whiteley* (1887), 12 A.C. 727 (H.L.).

[37] Draft Bill, s. 25(2).

[38] The removal of a trustee may be made under an express power contained in the trust instrument, under the statutory power discussed herein, or by an order of the court under its inherent or statutory authority. See Hayton (ed.), *Underhill's Law relating to Trusts and Trustees* (13th ed., 1979), at 613 *et seq*. In addition, a trustee may possibly be discharged if all the beneficiaries consent, provided that they are all capacitated: see, for example, *Butt v. Kelson*, [1952] Ch. 197, [1952], All E.R. 167 (C.A.). However, see also *Re Brockbank*, [1948] Ch. 206, [1948] 1 All E.R. 287, where it was held that beneficiaries may not interfere with the exercise by trustees of their statutory power of appointing substitute trustees.

[39] *Supra*, note 7, s. 27.

[40] *Supra*, note 8, s. 31.

[41] 56 & 57 Vict., c. 53, s. 10 (U.K.).

1925.[42] The provisions of *Lord Cranworth's Act* were reproduced in Ontario in *An Act to provide for certain amendments of the Law*,[43] and in *An Act respecting Trustees and Executors and the Administration of Estates*;[44] the statutory power has remained substantially unchanged since that time. Section 3 provides as follows:

> 3.—(1) Where a trustee dies or remains out of Ontario for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, or has been convicted of an indictable offence or is bankrupt or insolvent, the person nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may by writing appoint another person or other persons (whether or not being the persons exercising the power) to be a trustee or trustees in the place of the trustee dying, remaining out of Ontario, desiring to be discharged, refusing or being unfit or incapable.
>
> (2) Until the appointment of new trustees, the personal representatives or representative for the time being of a sole trustee, or where there were two or more trustees, of the last surviving or continuing trustee, are or is capable of exercising or performing any power or trust that was given to or capable of being exercised by the sole or last surviving trustee.

As will be noted, removal may take place by the act of appointing a substitute trustee. The power is exercisable, in the circumstances described in the section, by the person nominated by the instrument to appoint new trustees. If that person is not "able and willing to act", the power is exercisable by the surviving or continuing trustee. Failing such a trustee, the power may be exercised by the personal representatives of the last surviving or continuing trustee. The person appointed a new trustee may be the person exercising the appointment power. It follows, therefore, that the person nominated by the instrument to appoint new trustees, if such a person is nominated, or the personal representatives of the last surviving or continuing trustee, may be so appointed. Section 3(1) requires that the appointment be made in writing. Finally, subsection (2) authorizes the personal representatives of a sole or last surviving or continuing trustee to exercise or perform any of the trusts or powers that were capable of being exercised or performed by the deceased trustee.

We have already recommended that the revised Act should retain, in an amended and improved form, the statutory non-judicial power of replacement or removal of a trustee by the appointment of a substitute trustee.[45] In assessing the adequacy of section 3, it should be recalled that the purpose of this type of power is to provide, wherever compatible with the best interests of the trust beneficiaries and sound trust administration, the means for non-judicial appointment, thereby relieving the parties involved of the need to apply to the court. The attainment of this objective necessitates a review of the range of persons entitled to appoint trustees non-judicially and the types of circumstance in which the non-judicial power to appoint substitute trustees should be exercisable.

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[42] *Supra*, note 5, s. 36.

[43] *Supra*, note 9, s. 30.

[44] R.S.O. 1877, c. 107, s. 3.

[45] *Supra*, this ch., and Draft Bill, ss. 19-25.

Before we turn our attention to these matters, there are two general issues that should be addressed. The first relates to the right of the creator of the trust to oust the application of section 3, and the other concerns the form that the instrument of appointment and discharge should take.

As to the first issue, the statutory power to appoint substitute trustees non-judicially was introduced in 1860,[46] and was modelled on a power commonly included in trust instruments. The inclusion of the power in the statute was merely enabling; that is, if he wished, the creator of the trust could exclude the statutory power in whole or in part. This continues to be the case under section 3 of the Ontario *Trustee Act*.[47] We see no reason why the statutory power should not continue to be subject to a contrary intent expressed in the trust instrument, and we so recommend.[48] However, in relation to a trustee who desires to retire and be discharged from the trust, we would note that, although the trust instrument may preclude the exercise of the appointment power upon the retirement of a trustee, we have previously recommended that nothing in the trust instrument should withhold from a trustee the right to retire.[49]

We turn now to consider the second general issue. As stated, section 3(1) of the *Trustee Act* provides that the appointment of a substitute trustee shall be "by writing". By way of contrast, section 2 of the Act requires that the consent of the qualified persons to the retirement of a trustee must be given by deed. The same distinction is present in the English *Trustee Act, 1925*.[50] We do not consider that there is a basis for the existence of this distinction, and recommend that all instruments of appointment and of discharge, whether pursuant to a statutory authority or the trust instrument, should be by deed.[51]

It is our intention that the non-judicial statutory power should become the more frequently employed means of appointing and discharging trustees. We also later propose that greater significance than is afforded at present should attach to the instrument as a means of assuring a third party dealing with trustees of the validity of an appointment or a discharge, the vesting of trust property in the new trustees, and that trustees possess and are exercising their powers properly.[52] In our view, a deed would impress upon those persons charged with appointing and discharging trustees the importance of their act. Moreover, as a deed would normally be executed in a lawyer's office, evidence of a change in trusteeship would be preserved and available to interested parties. For these reasons, the Commission is also of the view that the creator of the trust should not be able to oust the requirement of a deed, and we so recommend.[53]

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[46] *Lord Cranworth's Act*, *supra*, note 7, s.27.

[47] *Trustee Act*, *supra*, note 3, ss. 67 and 68.

[48] Draft Bill, s. 2(*b*).

[49] *Ibid.*, s. 25(2), and *supra*, this ch., sec. 1(a).

[50] *Trustee Act, 1925*, *supra*, note 5, ss. 36 and 39.

[51] Draft Bill, ss. 19(1), 21, and 25(1) and (3).

[52] See *infra*, this ch., secs. 2, 3, and 4.

Finally, regarding the form of the deed, while the Commission is of the opinion, for the reasons given, that the instrument of appointment or of discharge should be a formal document, we are, nonetheless, of the view that the seal is no longer a meaningful requirement. Rather, we believe that other requirements, such as witnessing and affidavits of execution, would provide sufficient formality for instruments of appointment and of discharge. Accordingly, the Commission recommends that, for the purposes of the revised Act, a deed should be an instrument signed by those persons who have the power to appoint or discharge the trustees, attested by one witness and accompanied by an affidavit of execution, but that it should not require a seal.[54]

In addition, we are of the view that two matters, if contained in the trust instrument, should be recited in the deed of appointment or of discharge. First, where the appointment or discharge of a trustee is pursuant to a power contained in the trust instrument, the deed should set out the terms of the trust instrument that authorize the act.[55] Secondly, where trustees are authorized by the trust instrument to act by a majority,[56] this authority should be set out in the deed of appointment or of discharge.[57]

As noted previously, we shall be proposing that the deed of appointment or of discharge should be afforded greater significance than at present. Accordingly, we recommended that the requirement of a deed for appointing and discharging trustees should be mandatory. To further emphasize the importance attached to the deed, we are of the view that the revised Act should state expressly the consequences of failure to comply with the above-noted requirements for executing the deed of appointment or of discharge, namely, that the appointment and discharge will be invalid. Accordingly, we recommend that, where the appointment or discharge of a trustee is not by deed in the form recommended above, the appointment or discharge should be invalid for all purposes.[58]

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[53] Draft Bill, s. 32(1).

[54] *Ibid.*, s. 1(*e*). Dr. Derek Mendes da Costa, Q.C., Chairman of the Commission, dissents in part from this recommendation:

> It is my view that compliance with the formalities of a deed of appointment should not be sufficient to constitute a person a trustee. In my opinion, no appointment of an added or substitute trustee should be effective without the consent of the person to be appointed. The office of trustee is an onerous office, and the right of a trustee to disclaim does not meet my concern. A person who is advised that he has been appointed a trustee might be unaware that he can disclaim, or, if so aware, would in all probability be well advised to incur the trouble and expense of seeking legal advice. Moreover, the law relating to this topic is not without complication. I understand that 'good practice' dictates that prior consent be obtained, and I know of no good reason for retaining the present law. I would note that section 62(6) of the *Children's Law Reform Act*, R.S.O. 1980, c. 68, as am. by the *Children's Law Reform Amendment Act, 1982*, s.1, provides that no 'appointment under subsection (1), (2) or (3) is effective without the consent of the person appointed'. Section 62 (1), (2) and (3) deals with appointments by will in the context of custody and guardianship.

[55] *Ibid.*, s. 32(2).

[56] See *infra*, this ch., sec. 4, for a discussion of clauses contained in trust instruments that authorize a majority of trustees to bind the trust.

[57] Draft Bill, s. 32(3).

(i) Persons Entitled to Appoint Trustees Under the Statutory Power

Section 3(1) of the Ontario *Trustee Act* provides that the persons entitled to appoint substitute trustees are the persons nominated by the instrument, or failing such a person, or such a person able and willing to act, the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee. We now turn to consider difficulties that may occur when the power to appoint trustees is exercisable by these classes of person.

a. Persons Nominated by the Instrument

The power conferred by section 3(1) is exercisable, *inter alia*, by the person nominated by the instrument to appoint new trustees. Many Canadian trust instruments confer on specific persons, normally a beneficiary of the trust or the trustees themselves, the power to appoint trustees.[59] Two matters require our attention. The first concerns the circumstances in which the trust instrument should be regarded as indicating an intent to oust the exercise of the statutory power by the person nominated in the trust instrument. The second matter relates to the requirement that the person nominated by the instrument must be "able and willing" to act.

As to the first matter, it will be recalled that the statutory power contained in section 3(1) takes effect "subject to the terms" of the instrument creating the trust.[60] Assume that a trust instrument contains an express power to appoint trustees. Can it be argued that the mere existence of this power, even if it is not so extensive in scope as the power conferred by section 3(1), has the effect of ousting the statutory power, thereby rendering the person named in the trust instrument not a "person nominated for the purpose of appointing new trustees by the instrument" under section 3(1) of the Ontario Act? That is to say, if a power to appoint in certain circumstances is given to a particular person, can that same person appoint under the statutory power in circumstances that justify appointment of substitute trustees under the statute, but not under the express power in the instrument? In the alternative, is the statutory power in such a case exercisable only by the continuing or surviving trustees or their personal representatives? For instance, the express power may give to the life tenant a power to appoint trustees, but enumerate only the death or retirement of a trustee as the circumstances in which it may be exercised. Can the life tenant appoint a substitute trustee if an existing trustee is unfit to act, a circumstance provided by the statute?

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[58] *Ibid.*, s. 32(5).

[59] In the alternative, the trust instrument may name specific persons, each to succeed as trustee the named predecessor should the latter be incapable of acting when called upon to assume office, or later become incapable of continuing or unwilling to continue.

[60] *Trustee Act*, *supra*, note 3, ss. 67 and 68.

One line of reasoning, followed in England, is that, as the creator of the trust has provided for the appointment of trustees and stated the circumstances in which that power is to be exercised by the person nominated, he has impliedly said he does not wish that person to exercise the statutory power.[61] Another line of reasoning is that, to the extent the instrument is silent, it does not demonstrate an intention to oust the exercise of the statutory power by the person nominated in the instrument to appoint new trustees. In other words, under the former interpretation, the life tenant could not invoke the statutory power in order to replace the trustee who is unfit to act; under the latter interpretation he could, because the creator of the trust has said nothing about this particular circumstance in the instrument.[62] Although there is no case law on this subject in Ontario, it is possible that a court in this Province would follow the English interpretation of almost identical statutory language in force in that jurisdiction.

The Commission is of the view that this matter should be clarified, and has concluded that the latter approach is probably more consistent with the intention of the creator of the trust. Accordingly, we recommend that where a person is nominated in a trust instrument for the purpose of appointing substitute or additional trustees, he should be deemed to be nominated for the purpose of appointing substitute trustees in any of the circumstances set forth in the statute. Furthermore, the fact that the circumstances, if any, set forth in the trust instrument that empower the person therein nominated to act in the appointment of substitute trustees do not include all or any of the circumstances set forth in the statute, should not itself constitute a contrary intent on the part of the person creating the trust that the statute is not to apply.[63]

With respect to the second matter, section 3(1) provides that a nominated appointor shall take priority in appointing if he is "able and willing to act". The issue that arises is whether the word "willing" is ambiguous in this context and, therefore, should be deleted. Before proceeding to consider this issue, we would point out that, if there is no nominee "able and willing" to act, the power to appoint a substitute trustee passes, under the section, to the class of persons next entitled, the surviving or continuing trustees. If there is such a nominee, but contrary to the wishes of those interested in the trust no substitute appointment is made under section 3(1), the power will not pass to the surviving or continuing trustees; rather, relief must be sought from the court.

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[61] See *Re Wheeler and De Rochow*, [1896] 1 Ch. D. 315, *per* Kekewich J.

[62] Although this latter approach was preferred by Neville J. in *Re Sichel's Settlements*, [1916] 1 Ch. 358, he nevertheless followed *sed dubitante* Kekewich J.'s interpretation in *Re Wheeler and De Rochow*, *supra*, note 61.

[63] Draft Bill, s. 19(3). This position is also adopted by the New South Wales *Trustee Act, 1925*, *supra*, note 6, s. 6(10); the New Zealand *Trustee Act 1956*, *supra*, note 6, s. 43(8); and the Western Australia *Trustees Act, 1962*, *supra*, note 6, s. 7(8).

Assume that circumstances arise that justify the exercise of the appointment power under section 3 of the Ontario *Trustee Act*. It seems clear that a nominee who refuses to turn his mind to the desirability of making a replacement appointment is not "willing" to act, and, accordingly, that the surviving or continuing trustees could appoint a substitute trustee. However, the nominee might turn his mind to the matter but, after due consideration, decide not to exercise the statutory power; for example, he might choose not to remove a trustee who is unfit to act. It could be argued that a nominee who behaves in this fashion is also not "willing" to act, and that again the appointment power should pass to those next entitled. In the view of the Commission, however, this would be an incorrect reading of the section. The *bona fide* wishes of a nominated appointor should not be overriden in this fashion; rather, this situation would seem most appropriate for resolution by the court.

The Commission has considered whether, in order to correct any potential ambiguity, the word "willing" should be omitted from the revised Act, but has decided that such a deletion could create more difficulties than it would solve. The deletion of the word "willing" would remove the possibility that the *bona fide* wishes of a dissenting appointor could be disregarded, but it would also require judicial intervention in situations where a nominated person, who would simply prefer that others make the appointment, does not turn his mind to the issue. It is possible to suggest that this problem might be solved by providing that a person nominated to appoint trustees should be deemed "willing" to act if he chooses to consider the appointment, but after due deliberation decides not to exercise the statutory power. After careful consideration, we have rejected this approach also, because of the seemingly inherent problems of proof. Moreover, we have observed that, in fifty-nine years, no criticism has apparently been made of the term "able and willing" in the English *Trustee Act, 1925*, a term that occurs on a number of occasions in that Act. Accordingly, we recommend that the revised Act should retain the word "willing" with respect to the qualifications of a person nominated to appoint a substitute trustee, and our Draft Bill so provides.[64]

A subsidiary issue concerning joint nominees flows from the foregoing discussion. At present, no separate provision appears in the Ontario *Trustee Act* respecting joint nominees. It has been held in England that persons jointly nominated are "unable and unwilling to act" where they are not able to agree about the person to be appointed a substitute trustee;[65] however, the position in Ontario cannot be stated with complete certainty. In order to avoid the possibility of judicial intervention in a situation where joint nominees may satisfy the requirements by being able and willing to act individually, but are nonetheless in disagreement, we are of the opinion that this point should be stated in the statute. Accordingly, we recommend that the revised Act should contain a provision to the effect that where jointly nominated persons are unable to agree in naming an appointee, they should be deemed to be unable to act within the terms of the section authorizing the non-judicial appointment of trustees.[66]

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[64] Draft Bill, s. 19(1).

[65] *In re Sheppard's Settlement Trusts*, [1888] W.N. 234 (Ch.D.).

b. The Surviving or Continuing Trustees

Under section 3(1) of the Ontario *Trustee Act*, persons entitled to appoint substitute trustees include the "surviving or continuing trustees or trustee for the time being". The concept behind this terminology is that a trustee who dies leaves "surviving" trustees, if such exist, to carry on the trust and, likewise, that a trustee who retires or is removed leaves "continuing" trustees. This approach raises the question whether a retiring trustee, a refusing or disclaiming trustee, a trustee who is removable for cause, or a sole trustee, should be regarded as a "surviving or continuing" trustee for the purpose of exercising the statutory power contained in section 3(1). Since the revised Act is intended to establish a comprehensive scheme for the non-judicial appointment of substitute trustees, a scheme that the creator of the trust can exclude or amend in whole or in part, these questions should not be left unresolved.

We turn first to the position of a trustee who desires to retire from the trust; that is, a trustee who wishes to cease to act as trustee and to be discharged from the trust. Can such a trustee appoint, or join in the appointment of, a substitute trustee pursuant to the statutory power contained in section 3(1) of the *Trustee Act*? As a retiring trustee does not continue as trustee after a new appointment has been made, it would seem clear that he is not a "continuing trustee" within the meaning of this subsection.[67] Further, there is no authority elsewhere in the *Trustee Act* expressly authorizing a retiring trustee to appoint his replacement. At present, therefore, if a trustee wishes to retire, he may do so, but he must leave it to the continuing trustees, or to the court where there are no continuing trustees, to appoint a substitute trustee.[68]

The English *Trustee Act, 1925* overcame this difficulty by providing in section 36(8) that "[t]he provisions . . . relative to a continuing trustee include a . . . retiring trustee, if willing to act in the execution of the provisions of this section". In effect, this statutory provision deems a retiring trustee to be a trustee who will continue after the replacement appointment for the purpose of appointing a successor trustee, thereby enabling him to concur in or disapprove of the appointment of the person who is to replace him. As a consequence, this provision also obviates the need for court approval of a replacement appointment in circumstances where there will be no continuing trustees – for example, if all trustees wish to retire. We are of the view that a retiring trustee should be entitled to exercise the statutory power to appoint substitute trustees. To preclude evidentiary problems, however, we consider that the desire to be discharged should be expressed in writing. Accordingly, we recommend that the revised Act should provide that, for the purpose of exercising the non-judicial statutory power to appoint substitute trustees, a surviving or continuing trustee should include a trustee who expresses in writing a desire to be discharged from all or any of the trusts or powers reposed in or conferred upon him, and our Draft Bill so provides.[69]

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[66] Draft Bill, s. 19(4). In our view, this situation differs from the case, discussed above, where the nominated appointer, upon consideration, decides not to exercise the statutory power. In the latter case, to permit appointment by those next entitled would be to override the *bona fide* wishes of the nominated appointer. In the case under consideration, there is simply an inability to effectively determine the issue.

[67] See *Stones v. Rowton* (1853), 17 Beav. 308, 51 E.R. 1052.

[68] See *Re Moorhouse*, [1946] 4 D.L.R. 542 (Ont. H.C.J.), at 544.

The second issue is whether a trustee who refuses to act or disclaims should be entitled to exercise the statutory power to appoint substitute trustees under section 3(1). We understand[70] a refusing trustee to be one who has accepted the office of trustee, but who is unwilling to act or to act further,[71] and a disclaiming trustee to be one who has disclaimed the office and never acted in that capacity. As in the case of a retiring trustee, neither a refusing trustee nor a disclaiming trustee continues to occupy the office of trustee after the replacement appointment. Moreover, it may even be contended that a refusing trustee ceases to continue as a trustee prior to the replacement appointment upon his refusal to act as a trustee, and it is certain that a disclaiming trustee has never acted in the capacity of trustee. Consequently, it would seem that neither a refusing nor a disclaiming trustee is entitled to join as a "continuing trustee" in the appointment of a substitute trustee, and that judicial approval is necessary for the appointment of trustees in circumstances where, for example, all trustees refuse to act.

We have referred above to section 36(8) of the English *Trustee Act, 1925* in the context of a retiring trustee. This subsection also refers to a refusing trustee and provides that a continuing trustee includes "a refusing . . . trustee, if willing to act in the execution of the provisions of the section". Similar legislation exists in New South Wales,[72] and the legislation includes the qualification that a refusing trustee be willing to act in the appointment. Section 6(11) of the New South Wales statute, however, also adds two further qualifications: namely, that a refusing trustee may not act apart from the continuing trustee where there is in fact a continuing trustee; and that if a refusing trustee does not act in the appointment, the fact that he was willing to act shall not affect the validity of an appointment made by any other person.

Notwithstanding the approaches taken in England and New South Wales, it is our opinion that the primary issue is whether a refusing or disclaiming trustee should be entitled to take any part in an appointment of a trustee under section 3(1). We have concluded that, unless the trust instrument provides to the contrary, a person who refuses to carry out the responsibilities of a trustee, or who disclaims the office, is not a suitable person to exercise the statutory power.[73] Should all trustees refuse to act or should they all disclaim, an application to the court would be required to appoint substitute trustees; in this fashion, the best interests of the trust beneficiaries are more likely to be secured. We are strengthened in our view by the fact that refusal to act is a ground for the removal of a trustee,[74] and we shall later recommend that a disclaimer in writing should also be a distinct ground for removal under the revised Act.[75] Accordingly, we recommend that the revised Act should provide that, for the purpose of exercising the non-judicial statutory power to appoint a substitute trustee, a surviving or continuing trustee should not include a trustee who in writing disclaims the trust or who, having neither disclaimed nor resigned, refuses to act as trustee, unless, of course, the trust instrument expressly authorizes such a person to make an appointment. Our Draft Bill reflects this recommendation.[76]

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[69] Draft Bill, s. 19(6).

[70] See *infra*, this ch., sec. 1(b)(ii).

[71] Such a person nevertheless exposes himself to liability with his co-trustees for any breach of trust that his co-trustees perpetrate. No trustee may plead his own inactivity as a ground for indemnification by his co-trustees: see *Lewin on Trusts*, *supra*, note 18, at 674.

[72] *Trustee Act, 1925*, *supra*, note 6, s. 6(11).

The third issue relating to the ambit of the phrase "surviving or continuing" trustees is whether a trustee who may be removed for cause under section 3(1) of the Ontario *Trustee Act* should be a party to the appointment of a substitute trustee. In *In re Stoneham Settlement Trusts*,[77] it was held that a trustee who had been removed from office against his will under section 36(1) of the English *Trustee Act, 1925* could not demand to be a party to the appointment of his replacement; he was not a "continuing" trustee within the meaning of section 36(1) as modified or extended by the provisions of section 36(8).[78] This reasoning would seem to have like application in Ontario, and there is no express statutory provision entitling a trustee who is removable for cause to appoint a substitute trustee. We are of the view that the principle of *In re Stoneham Settlement Trusts* is correct, and therefore recommend that a trustee who is to be involuntarily replaced for cause should not be able to join in an appointment of his replacement.[79]

Finally, the trust instrument may appoint a sole trustee to act; that is, only one person may be appointed as trustee by the creator of the trust. Under section 3(1) of the *Trustee Act*, the statutory power is conferred upon the "surviving or continuing trustees or trustee". There is a question whether these words embrace a sole trustee who wishes to appoint his replacement, and the authorities are in conflict on this point.[80] The difficulty arises from the fact that this phrase would seem to presuppose an original appointment of two or more trustees.

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[73] It is true that a nominated trustee, unwilling to accept the office, but anxious to appoint his replacement, could accept the office, and then at once offer his resignation so that, as a retiring trustee, he would, if our previous recommendation is accepted, be entitled to participate in the replacement appointment. However, such a trustee might not receive the consent of his co-trustees to his retirement, and, if he were forced to retire under s. 2 of the Ontario *Trustee Act*, he would have achieved nothing since this is a retirement without the appointment of a substitute trustee.

[74] *Trustee Act*, *supra*, note 3, s. 3(1).

[75] See *infra*, this ch., sec. 1(b)(ii).

[76] Draft Bill, ss. 19(6) and 2(*b*).

[77] *In re Stoneham Settlement Trusts*, [1953] Ch. 59, [1952] 2 All E.R. 694 (subsequent references are to [1953] Ch.). This decision was contrary to the views of the text writers at that time: see, for example, Cozens-Hardy Horne (ed.), *Lewin's Practical Treatise on the Law of Trusts* (15th ed., 1950), at 422, and Underhill and Bagshawe, *The Law relating to Trusts and Trustees* (9th ed., 1939), at 416-18.

[78] *In re Stoneham Settlement Trusts*, *supra*, note 77, at 62-63.

[79] Draft Bill, s. 19(6).

At present, the only provision of the Ontario *Trustee Act* that relates to an appointment by a sole trustee is section 4, which provides as follows:

> 4. Subject to the terms of any instrument creating a trust, the sole trustee or the last surviving or continuing trustee appointed for the administration of the trust may appoint by will another person or other persons to be a trustee or trustees in the place of the sole or surviving or continuing trustee after his death.

This section empowers a sole trustee to appoint by will a trustee to succeed him. In the view of the Commission, such a provision serves a useful function, and, accordingly, we recommend its inclusion in the revised Act.[81] However, we would point out that section 4 deals only with the power to appoint by will. It does not relate to a sole trustee who wishes to appoint his replacement on the occasion of his retirement. In our view, the position of a sole trustee in this regard should be clarified.

We are of the opinion that, consistent with our previous recommendation that a retiring trustee should be entitled to join in the appointment of a substitute trustee, a sole trustee should be able to appoint a substitute trustee on the occasion of his own retirement. It should be noted that section 3(1) permits the statutory power to be exercised by the last surviving or continuing trustee. We agree with this result, and we see no reason to distinguish between the position of the last surviving or continuing trustee and that of a sole trustee. As with our previous recommendations, we do not consider that the appointment power should be conferred upon a sole trustee who refuses to act, disclaims the trust, or is otherwise removable for cause. Accordingly, we recommend that the revised Act should expressly provide that, for the purpose of exercising the non-judicial statutory power to appoint substitute trustees, a surviving or continuing trustee should include a sole trustee who expresses in writing a desire to be discharged from all or any of the trusts or powers reposed in or conferred upon him.[82]

c. *The Personal Representatives of the Last Surviving or Continuing Trustee*

In the absence of a surviving or continuing trustee, section 3(1) of the Ontario *Trustee Act* confers the power to appoint a substitute trustee upon

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[80] In *Re Thompson and Jenkins* (1928), 63 O.L.R. 33 (H.C. Div.), at 35, Middleton J.A. was of the opinion that a sole trustee could appoint his replacement upon his retirement under the power conferred by the present s. 3(1), while in *Re National Trust Co. and McLaughlin* (1925), 57 O.L.R. 319 (H.C. Div.), at 321, Riddell J. was of the opposite view. In England, it is generally believed that the phrase "the last surviving or continuing trustee" includes a sole trustee: see Pettit, *Equity and the Law of Trusts* (4th ed., 1979), at 242. However, the case cited for this proposition, *In re Shafto's Trusts* (1885), 29 Ch. D. 247, concerned the question whether the personal representatives of a deceased sole trustee could appoint as "the personal representatives of the last surviving or continuing trustee". It may, therefore, be said that this case does not clearly determine the position of the sole trustee himself.

[81] Draft Bill, s. 20.

[82] *Ibid.*, s. 19(6).

"the personal representatives of the last surviving or continuing trustee". It may be argued that a personal representative could be remote from the conduct of the trust administration and the circumstances of the trust beneficiaries. Accordingly, we have considered whether it is appropriate to authorize the personal representative to appoint a substitute trustee. This power was a customary express power that was made statutory by *Lord Cranworth's Act*,[83] and in both Ontario and England it has existed in statutory form without criticism for over one hundred years. We see, therefore, no reason to depart from a provision that has operated with apparent efficiency for so long, and recommend that it be carried forward into the revised *Trustee Act*.[84] We would point out that, if our previous recommendations concerning which trustees should be considered "surviving or continuing" trustees are accepted, the personal representatives of a refusing or disclaiming trustee, or of a trustee removable for cause from office, would not be entitled to appoint substitute trustees.

While we agree that the power to appoint a substitute trustee should continue to be exercisable by the personal representatives of the last surviving or continuing trustee, there are three matters that have concerned us. The first relates to the position of an executor who has not proved his testator's will. Assume that the last surviving or continuing trustee dies, having by his will appointed executors, one or more of whom do not join in proof of the will. Can a non-proving executor be said to be one of the "personal representatives" of the last surviving or continuing trustee so as to require his participation with the proving executors in the replacement appointment? An English case has held that the term "personal representatives", as this term appeared in the *Land Transfer Act, 1897*,[85] included all those answering to that description whether or not they had obtained a grant of probate.[86] On the basis of this decision it was considered that, since the same term appeared in the trustee legislation,[87] all executors would have to join in a replacement appointment, including any executor who had not proved the will.[88] In order to avoid this situation, section 36(4) of the English *Trustee Act, 1925* provides that the statutory power may be exercised by the executors for the time being "who have proved the will of their testator or by the administrators for the time being of such trustee without the concurrence of any executor who has renounced or has not proved".

The Ontario *Trustee Act* contains no such provision, although section 40 of the Act does provide, *inter alia*, that an executor to whom probate is granted may in all respects act as effectually as though he alone had been named by the testator as his sole executor. It could be contended that this section authorizes the proving executors to make a replacement appointment without the consent of a non-proving executor. Nevertheless, the position cannnot be stated with certainty. In the opinion of the Commission, it is not desirable to cast upon the executors who have proved the will the need to enlist the cooperation of a non-proving executor in order to effect a valid replacement appointment. Accordingly, we recommend that the revised Act should provide that, for the purpose of exercising the non-judicial statutory power to appoint substitute trustees, the power conferred upon the personal representatives of a last surviving or continuing trustee should be exercisable by the executors for the time being of the last surviving or continuing trustee who have proved the will of the testator, or by the administrators for the time being of such trustee, without the concurrence of an executor who has renounced or has not proved.[89]

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[83] *Supra*, note 7, s. 27.

[84] Draft Bill, s. 19(1).

[85] 60 & 61 Vict., c. 65 (U.K.).

[86] *In re Pawley and London and Provincial Bank*, [1900] 1 Ch. 58.

[87] *Trustee Act, 1893*, *supra*, note 41, s. 10 (U. K.).

[88] See Underhill, *The Law relating to Trusts and Trustees* (7th ed., 1912), at 380, *n.* (r).

The above recommendation is premised on the assumption that one or more executors have proved the deceased's will and wish to act. The second matter that requires attention concerns the position where all executors intend to renounce probate; should they be entitled to exercise the statutory power to appoint substitute trustees? Section 36(5) of the English *Trustee Act, 1925* permits a sole or last surviving executor intending to renounce probate, or all the executors where they all intend to renounce, to exercise the power to appoint trustees, if willing to act, any time before renouncing probate and without thereby accepting the office of executor. This provision is consistent with section 36(8) of the English Act which, as previously noted, enables a refusing trustee to appoint a substitute trustee, and reflects the English position of allowing non-judicial appointment of trustees as much as possible.

It will be recalled that we have previously recommended that a trustee who refuses to act or who disclaims the office of trustee should not be permitted to appoint substitute trustees under the statutory power.[90] In the view of the Commission, an executor of a last surviving or continuing trustee who intends to renounce probate should be in a position no different from a trustee who refuses to accept the office or to act further as a trustee. In these circumstances, appointment by the court is preferable. Accordingly, we recommend that a provision similar to section 36(5) of the English Act should not be included in the revised Act.

Finally, we refer to the position of a trustee who is appointed by will and who predeceases his testator. It has been held in England that such a testamentary trustee is not a "surviving or continuing trustee" within the meaning of the English legislation,[91] and that his personal representatives may not appoint under the statutory power.[92] Neither the Ontario *Trustee Act* nor the English *Trustee Act, 1925* expressly extends to the personal representatives of a testamentary trustee who predeceases the testator, even if he be the sole nominated trustee, the power to appoint a substitute trustee,[93] although it may be argued that section 8 of the Ontario Act would do so. Specifically, section 8 provides as follows:

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[89] Draft Bill, s. 19(7).

[90] See *supra*, this ch., sec. 1(b)(i)b.

[91] The legislation in question was the *Conveyancing and Law of Property Act, 1881*, *supra*, note 8.

[92] *Nicholson v. Field*, [1893] 2 Ch. 511. The same reasoning would exclude a person nominated trustee of an *inter vivos* trust who dies before the instrument takes effect.

> 8. The provisions of this Act relative to the appointment of new trustees apply to the case of a person nominated trustee in a will but dying before the testator.

By invoking "[t]he provisions of this Act relative to the appointment of new trustees", namely, section 3(1), not only may the surviving or continuing trustees appoint a new trustee to replace one of their number who dies before the testator, but the personal representatives of the last surviving or continuing trustee may exercise the appointment power where all the persons nominated trustees predecease the testator.[94] Regarding the utilization of section 8 by the surviving or continuing trustees, we later recommend that the vacancy left by the death before the testator of a person nominated trustee should be filled by the exercise of the proposed non-judicial appointment of an additional trustee,[95] thereby obviating the necessity for a section 8-type provision in that context. In relation to the possible application of section 8 to permit personal representatives of a person nominated trustee but dying before the testator to appoint new trustees, the Commission prefers the English position, which appears to be that the connection between the trust and these particular personal representatives is too remote, given that the deceased nominated trustee would never have handled the trust business. Accordingly, we recommend that the revised Act should expressly state that, for the purpose of exercising the non-judicial statutory power to appoint substitute trustees, a surviving or continuing trustee should not include any person appointed a trustee who predeceases the taking effect of the trust.[96] Such a recommendation would also preclude a personal representative of such a person from exercising the power to appoint trustees.

(ii) Circumstances in Which the Non-Judicial Statutory Power is Exercisable

One of the vital features of section 3(1) of the Ontario *Trustee Act* relates to the circumstances in which the non-judicial power to appoint substitute trustees may be exercised. The subsection has two broad functions. First, it provides a means for the replacement of a trustee who dies or who desires to be discharged; and secondly, it provides a mechanism for the removal of a trustee for the various causes enumerated in the subsection. The replacement or removal is effected by the appointment of another person to be trustee in the place of the trustee dying, remaining out of Ontario, desiring to be discharged, refusing to act, being unfit or incapable of acting as trustee, being convicted of an indictable offence, or being bankrupt or insolvent. This aspect of the section has generally proved satisfactory in operation and, subject to certain matters dealt with below, we recommend that it should be carried over to the revised Act.[97]

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[93] This may not have been the intention of *Lord Cranworth's Act*, *supra*, note 7, s. 28, which first expressly permitted the appointment of a new trustee where a trustee nominated in the will had died in the testator's lifetime. In Ontario, *An Act to provide for certain amendments of the Law*, *supra*, note 9, s. 30(2), reproduced by *An Act respecting Trustees and Executors and the Administration of Estates*, *supra*, note 44, s. 3(2), enacted the same provision. Had the Act provided that "the personal representatives of a person nominated trustee in a will, but dying in the testator's lifetime, may appoint", *Nicholson v. Field*, *supra*, note 92, would not have occurred.

[94] See Waters, *Law of Trusts in Canada* (1974), at 562.

[95] See *infra*, this ch., sec. 1(e).

[96] Draft Bill, s. 19(6).

The first matter that we wish to discuss relates to the position of a trustee who is an infant. Under section 3(1) of the Ontario *Trustee Act*, infancy of a trustee is not included as a circumstance that would justify the non-judicial removal of that trustee by the appointment of a substitute trustee. Although there are in Ontario distinct legal limitations on the capacity of a person under the age of majority, there is no general prohibition against such a person assuming an express trusteeship. Like Ontario, Northern Ireland[98] omits infancy as a ground for non-judicial removal. Other Canadian and Commonwealth jurisdictions have responded differently to this situation.[99] For example, in England a person under the age of majority is incapacitated by statute from acting as an express trustee.[100] Consequently, section 36(1) of the English *Trustee Act, 1925* provides that infancy is a ground for the non-judicial removal of a trustee by the appointment of a substitute trustee. After careful consideration, and in view of the fact that the appointment of an infant was the choice of the creator of the trust, we support the present Ontario position. If for any reason it should be considered that an infant is unsuitable to act as a trustee, an application for his removal may be made to the court. The court may consider that arrangements should be made so that the infant can assume the trusteeship upon attainment of majority, and such a course of action may well seem appropriate where the person in question is very near that age. In our view, it all depends on the circumstances; some persons might be unsuitable even when they attain the age of majority, and for this reason we prefer to leave the matter to the discretion of the court. Accordingly, we recommend that in the revised Act, as in section 3(1) of the Ontario *Trustee Act* at present, minority should not be a circumstance justifying non-judicial removal by the appointment of a substitute trustee.

The second matter concerns the restrictions, if any, that should be placed upon the non-judicial removal of a trustee who is unfit or incapable of acting. At present, section 3(1) of the Ontario *Trustee Act* provides that, where a trustee is unfit to act or is incapable of acting as trustee, he may be replaced. These two circumstances also appear in section 36(1) of the English *Trustee Act, 1925*, and in that context "unfit" has been interpreted as including bankruptcy, liquidation, or conviction of a felony, while "incapable" has been construed as meaning personal incapacity, such as a physical or mental disorder.[101] In Ontario, however, section 3(1) of the *Trustee Act* expressly enumerates conviction of an indictable offence and bankruptcy or insolvency as circumstances permitting the non-judicial replacement of a trustee. Therefore, "unfit" to act in the Ontario Act would appear to comprehend other objectionable conduct. Like the English position, "incapable" of acting would seem to refer to physical or mental incapacity, but could also include old age or failing capacities. In effect, what should be sufficient to render a trustee "unfit" or "incapable" of acting cannot be defined with certainty. Because these are matters upon which differences of opinion may easily arise, the Commission has considered whether they should continue to be circumstances that permit the non-judicial removal of a trustee, or whether resort to the courts would be the more appropriate means of adjudging whether a trustee is incapable or unfit to act.

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[97] *Ibid.*, s. 19(1).

[98] *Trustee Act (Northern Ireland), 1958*, *supra*, note 30, s. 35(1).

[99] See, for example, the Manitoba *Trustee Act*, *supra*, note 6, s. 10(1), and the New South Wales *Trustee Act, 1925*, *supra*, note 6, s. 6(2)(e), which include infancy as a ground for non-judicial removal. See, also, the New Zealand *Trustee Act 1956*, *supra*, note 6, s. 43, which does not include infancy as a ground for non-judicial removal.

[100] *Law of Property Act, 1925*, 15 & 16 Geo. 5, c.20, s. 20 (U.K.).

The Commission has concluded that where subjective value judgments concerning the ability of a person to act as trustee are concerned, these determinations should be made by a court, where the trustee in question, or someone on his behalf, can place the trustee's position before an impartial arbiter for consideration. Accordingly, we would limit the non-judicial removal of a trustee to objectively ascertainable circumstances. In our view this approach has two advantages. First, as one aim of the Commission's recommendations is to encourage the employment of the non-judicial appointment and discharge powers, trustees may more readily utilize a mechanism that provides clear, easily ascertainable criteria. On the other hand, trustees might be reluctant to exercise the non-judicial removal power based upon their subjective finding of incapacity of a co-trustee, especially where the removed trustee may bring an action for wrongful removal against those who exercised the non-judicial removal powers improperly;[102] the trustees might as well have applied to the court initially for a determination concerning whether the co-trustee should be removed because of his incapacity to act. Secondly, limiting the non-judicial removal power to objectively ascertainable circumstances would clearly differentiate the judicial appointment and removal power from the non-judicial appointment and removal power.

We are strengthened in our view by the fact that the English trustee legislation has taken the position that determinations of mental incapacity as a ground for the removal of a trustee should not rest entirely with the co-trustees. In England, where a trustee is incapacitated by a mental disorder within the meaning of the *Mental Health Act, 1959*,[103] section 36(9) of the *Trustee Act, 1925* requires that, if he is also beneficially interested in possession under the terms of the trust, no substitute appointment may be made under section 36(1) unless leave to make the appointment is given by "the authority having jurisdiction under Part VIII of the Mental Health Act, 1959".[104]

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[101] *Lewin on Trusts*, *supra*, note 18, at 414-15.

[102] See *infra*, this ch., sec. 1(d), and Draft Bill, s. 33.

[103] 7 & 8 Eliz. 2, c. 72, s. 4(1) (U.K.).

[104] *Trustee Act, 1925*, *supra*, note 5, s. 36(9), as amended by the *Mental Health Act, 1959*, *supra*, note 103, s. 149(1), and Sch. 7, Part 1.

While the Commission does not recommend the adoption of this type of consent mechanism,[105] we agree in principle that a determination of mental incapacity should be confirmed by an objective source before a trustee may be removed from office. In our view, the ability to remove non-judicially a mentally incapacitated trustee should be limited to the case of a mentally incompetent person so found by a court of competent jurisdiction. Accordingly, we recommend that the non-judicial removal of a trustee and the appointment of a substitute trustee should be permitted only in objectively ascertainable circumstances. In particular, incapacity and unfitness to act as trustee should no longer be circumstances that justify the non-judicial removal of a trustee, and we recommend that these grounds should not be included in the revised *Trustee Act* in this context. Rather, removal for these reasons should be effected judicially, either under the proposed judicial statutory power of removal[106] or pursuant to the inherent jurisdiction of the court, with the non-judicial removal power in this regard limited to instances of mentally incompetent persons so found by a court of competent jurisdiction.[107]

A further related matter concerns the provision in section 3(1) of the Ontario *Trustee Act* for the exercise of the non-judicial power of removal where a trustee is "bankrupt or insolvent". As with the abovementioned circumstances of incapacity and unfitness, insolvency is a matter based primarily upon subjective value judgments. Here too, opinions differ concerning what circumstances would be sufficient to constitute insolvency of a trustee. Consistent with the Commission's recommendation that the non-judicial removal power should be exercisable only in objectively ascertainable circumstances, we are of the view that the court is the more appropriate forum to determine, having regard to all the circumstances, whether a trustee is insolvent and should be removed from office.

Accordingly, we recommend that insolvency should not be a ground for the non-judicial removal of a trustee and the appointment of a substitute trustee. Rather, the non-judicial power to remove a trustee should be exercisable in cases of bankruptcy alone.[108] Further, we recommend that the term

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[105] Although the equivalent of s. 36(9) of the English *Trustee Act, 1925*, as amended, has been adopted in the Manitoba *Trustee Act*, *supra*, note 6, s. 10(7), and in the *Trustee Act (Northern Ireland), 1958*, *supra*, note 30, s. 35(9), we reject this approach for several reasons. First, this exception to the statutory power only applies to a certain class of mentally disordered persons. Under s. 101 of the *Mental Health Act, 1959*, *supra*, note 103, the person given authority to act under Part VIII is given jurisdiction only over mentally disordered persons so found. There is no jurisdiction over mentally disordered persons not so found; that is, those persons who would require a next friend as guardian *ad litem* to sue, if they were litigating. Furthermore, it is not obvious why the section does not show a similar concern for other beneficiaries who are incapacitated for other reasons. Also, the exception is restricted to trustees with interests in possession, as opposed to interests in remainder.

[106] Draft Bill, s. 56.

[107] *Ibid.*, ss. 19(1) and 1(*h*).

[108] *Ibid.*, s. 19(1)(*a*)(vi). It should be noted that s. 159 of Bill C-12, 1980 (32d Parl. 1st Sess.), the proposed federal legislation to amend the *Bankruptcy Act*, provides that, where a bankruptcy order is made against a trustee, he is thereafter replaced by the bankruptcy trustee, who has all the "rights, powers and duties" in respect of the property as had the debtor (or bankrupt) trustee. This section, however, also subordinates this

"bankrupt" should be defined to mean a person against whom a receiving order is in force, or who has made an assignment or a proposal under the *Bankruptcy Act* (Canada).[109]

It will also be noted that section 3(1) of the present Act is silent concerning a trust company that, while acting as trustee, is dissolved or goes into liquidation. Under section 36(3) of the English *Trustee Act, 1925*, such a corporate trustee is deemed, in the case of dissolution, to be incapable as of the date of dissolution. We see no reason why in Ontario an application to the court should be necessary in order to appoint a substitute trustee.[110] Accordingly, we recommend that the revised Act should provide that where a corporate trustee is dissolved or is in liquidation, it may be subject to non-judicial removal under the statutory power.[111]

The third matter that we wish to discuss in connection with circumstances justifying the exercise of the non-judicial statutory appointment power concerns the absence of a trustee from the jurisdiction. Section 3(1) provides that a trustee may be replaced if he "remains out of Ontario for more than twelve months". Absence of a trustee from the jurisdiction as a circumstance justifying removal appears in section 36(1) of the English *Trustee Act, 1925*, but it does not appear in the trustee legislation of Alberta, Saskatchewan, New Brunswick, the Yukon, or the Northwest Territories. On the one hand, we agree that any trustee who leaves the jurisdiction and, implicitly, the administration of the trust for an extended period of time should be removed from office. On the other hand, we see little objection to a trustee actively administering the trust from outside the jurisdiction. Today, for example, a trustee may have to leave the jurisdiction for business reasons, but may have no intention of abandoning responsible administration of the trust. If a settlor or testator was of the view that his trustees should reside in the particular jurisdiction or should not be absent from the jurisdiction for more than a

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procedure to any instrument creating the trust and *any other applicable law* (emphasis added). As the property held in trust by the bankrupt trustee does not form part of the assets that may satisfy his personal debts, and, therefore, *prima facie*, is not under the purview of the bankruptcy order, trust law, rather than bankruptcy law, has traditionally dealt with the problems, if any, created by the personal bankruptcy of a trustee *vis-à-vis* his relationship to the trust. Presumably, the phrase "any other applicable law" contained in s. 159 of Bill C-12 would include provincial trustee legislation, with the result that proposed section 19(1) of the revised *Trustee Act*, whereby a bankrupt trustee may be removed from office and replaced by a person deemed appropriate by those authorized to remove the trustee, would take precedence over s. 159 of the federal Bankruptcy Bill.

[109] Draft Bill, s. 1(*b*).

[110] On the dissolution of a corporation any undisposed property is forfeited to the Crown (*Corporations Act*, R.S.O. 1980, c. 95, s. 322, and *Business Corporations Act, 1982*, S.O. 1982, c. 4, s. 243(1)). Any property held in trust by the corporation would presumably also pass to the Crown, if the corporation were a sole trustee, so that the right of survivorship as between co-trustees could not apply. As to whether the Crown is bound by the trust, see *In re Taylor's Agreement Trusts*, [1904] 2 Ch. 737. If a new trustee is non-judicially appointed only upon the dissolution of the trust corporation, a problem arises – assuming it was the sole trustee – concerning how the new trustee shall be vested with the trust property: see, for example, *Re Canadian Fertilizer Co. Ltd. and Canadian Industries Ltd.*, [1938] O.W.N. 335 (H.C.J.), a case that predated the passing of the predecessor of the *Corporations Act*, s. 322 (namely, *The Companies Act*, S.O. 1947, c. 15, s. 3).

[111] Draft Bill, s. 19(1)(*c*).

stipulated time period, he could so provide in the trust instrument. Accordingly, we recommend that, unlike the situation under section 3(1) of the *Trustee Act*, the fact that a trustee remains out of Ontario for more than twelve months should not in itself be a circumstance justifying non-judicial removal under the revised Act. If absence of a trustee from the jurisdiction is creating difficulties, an application may, of course, be made to the court for his removal.

The next matter we consider relates to the death of a trustee. One of the prescribed circumstances in which a substitute appointment may be made under section 3(1) of the Ontario *Trustee Act* is where a "trustee dies". This provision must be read in the light of section 8 of the Ontario Act, which we referred to previously in the context of the role of the personal representative exercising the appointment power under section 3(1).[112] Section 8 is designed to cover the situation where a person who has been appointed a trustee by will predeceases the testator. In this event, such a person cannot be said to be a "trustee" who has died within the meaning of section 3(1). However, section 8 stipulates that the provisions of the Act "relative to the appointment of new trustees" apply; accordingly, the power to appoint a substitute trustee under section 3(1) becomes exercisable.

It may be that the remedy provided by section 8 is not frequently invoked in Ontario. However this may be, the Commission is of the view that the statutory power to appoint substitute trustees should apply only where a person may be said to be an actively involved trustee, and a person who predeceases the testator has never acted as trustee. Also, it would be inconsistent to deem such a person a trustee for this purpose, but at the same time to assert that he should not be considered a "surviving or continuing" trustee, in order to preclude the personal representatives of such a person from appointing new trustees.[113] We are, therefore, of the opinion that it would be more appropriate for the vacancy to be filled by the non-judicial appointment of an additional trustee, a power that we recommend in a later section of this chapter.[114] If a non-judicial statutory power to appoint additional trustees is accepted, we recommend that section 8 of the present *Trustee Act* should not be included in the revised Act.

The fifth matter that we wish to discuss concerns the fact that words are missing from section 3(1) of the Ontario *Trustee Act* that are present in other Commonwealth legislation based upon section 36 of the English *Trustee Act, 1925*. Section 36(1) states that it applies to any trustee who is to be replaced, whether he is "original or substituted, and whether appointed by a court or otherwise".[115] The *Trustee Act (Northern Ireland), 1958* adopts more comprehensive wording to address this matter, namely, "whether original, substituted or additional".[116] The meaning in section 3(1) seems clear, even though words of this nature are not included, but, in our opinion, the position should be placed beyond doubt. Accordingly, we recommend that it should be possible to remove a trustee under the non-judicial statutory removal power whether he be an original, substituted, or additional trustee. This recommendation is implemented in our Draft Bill by providing, *inter alia*, that the Bill applies to all trustees however and whenever appointed, except as otherwise expressly provided.[117]

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[112] See *supra*, this ch., sec. 1(b)(i)c.

[113] See *supra*, this ch., sec. 1(b)(i)c, and Draft Bill, s. 19(6).

[114] See *infra*, this ch., sec. 1(e).

[115] Section 36(1) of the English *Trustee Act, 1925*, *supra*, note 5, repeats language found in s. 27 of *Lord Cranworth's Act*, *supra*, note 7.

[116] *Supra*, note 30, s. 35(1).

Another matter that has concerned the Commission relates to a refusing trustee. Section 3(1) of the *Trustee Act* permits a substitute appointment when a trustee "refuses . . . to act". The meaning of the word "refuses" cannot be stated with complete certainty. The implication of section 3(1) seems to be that a refusing trustee is one who has initially accepted the office, either expressly or impliedly by participating in trustee affairs, and who subsequently refuses to act. It has been stated by text writers, however, that the term includes a person named as a trustee, but who has disclaimed the office by conduct or declaration, and thereby never acted in the capacity of trustee under the particular trust instrument.[118] Nonetheless, the case law does not support this statement unequivocally,[119] and in one sense, it might be said that such a person has never been a trustee at all. In the opinion of the Commission, this confusion in terminology should be ended. A person who has accepted the office of trustee, but who is unwilling to act or to act further, should be referred to as a refusing trustee, while a person who is named as a trustee, but who has disclaimed the office and never acted in that capacity should be referred to as a disclaiming trustee.[120] Further, in the view of the Commission, the non-judicial power of removal by the appointment of a substitute trustee should apply equally to a trustee who disclaims and to a trustee who refuses to act. To preclude evidentiary problems and to act as a caution to the trustee, the disclaimer should be in writing. If a trustee will neither accept the office, nor supply a written disclaimer, or if he cannot be traced, the trustees in office would have to apply to the court for removal, and we are of the view that this would be appropriate. Accordingly, we recommend that the revised Act should expressly include not only refusal to act, but also disclaimer of a trust in writing as a circumstance justifying non-judicial removal, and our Draft Bill so provides.[121]

Finally, a problem may arise concerning the relationship between express powers in the trust instrument and the statutory power contained in section

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[117] Draft Bill, s. 2(*a*).

[118] *Lewin on Trusts*, *supra*, note 18, at 414, and *Underhill's Law relating to Trusts and Trustees*, *supra*, note 38, at 625.

[119] See, for example, *Re Hadley* (1851), 5 De G. & Sm. 67, 64 E.R. 1021, and *In re Birchall* (1889), 40 Ch. D. 436 (C.A.).

[120] Draft Bill, s. 19(1)(*a*)(iii) and (*b*).

[121] *Ibid*. The Commission could have taken the view that a disclaiming trustee, like a named trustee who predeceases the taking effect of the trust, was never a trustee, and that, therefore, the trustee or trustees who have accepted office would instead appoint an additional trustee. However, since section 3(1) permits non-judicial removal by substitute appointment in the case of a refusing trustee, we are of the view that it would be more consistent, in this case, if the subsection were also to extend to disclaiming trustees.

3(1) of the Ontario *Trustee Act*. The instrument may contain a power whereby specified persons are entitled to remove a trustee, but contain no power authorizing the appointment of a substitute trustee. In other words, a trust instrument may provide for part of the matter covered by the subsection, but not for the whole. Section 36(2) of the English *Trustee Act, 1925* provides that in these circumstances a removed trustee who is an individual is to be regarded as dead, and a removed corporation as desiring to be discharged. In this way, the statutory power to appoint substitute trustees becomes exercisable. We think that this is a useful provision. Accordingly, we recommend that, where a trustee has been removed under a power conferred by a trust instrument, then, subject to the terms of a power of replacement in the trust instrument, and subject also to our later recommendations concerning the maximum number of trustees,[122] it should be possible to appoint one or more substitute trustees in the place of the removed trustee as if he had died or, in the case of a corporate trustee, as if it had expressed in writing a desire to be discharged from the trust.[123]

(c) NON-JUDICIAL REMOVAL WITHOUT APPOINTMENT OF SUBSTITUTE TRUSTEES

As will be recalled, the removal of a trustee under section 3(1) of the Ontario *Trustee Act* can only be accomplished by the appointment of a substitute trustee. At present, there is no statutory authority authorizing the non-judicial removal of a trustee without a substitute trustee being appointed in his place, although the court has an inherent jurisdiction to remove a trustee without appointing a new trustee.[124]

Nevertheless, situations may arise where it would be in the interest of the trust to remove a trustee without appointing a substitute trustee, as the co-trustees may be capable of carrying on the management of the trust. The Commission has considered, therefore, whether the revised Act should contain a provision to this effect, and has concluded that it should.[125] This approach is consistent with our previous recommendation that the revised Act should retain the non-judicial power to remove a trustee by appointing a replacement, but in an amended and improved form in order to facilitate the use of the non-judicial power as much as possible. Our view is that a non-judicial power to remove a trustee without the appointment of a substitute trustee is an obvious complementary provision to a comprehensive scheme of non-judicial powers. As to the circumstances that should permit such removal, we have concluded that the section in the revised Act should permit the non-judicial removal of a trustee without replacement in the same circumstances that permit non-judicial removal with replacement: namely, where a trustee refuses to act, is a mentally incompetent person, has been convicted of an indictable offence, is bankrupt, or where a person appointed a trustee disclaims the trust or where a corporate trustee is dissolved or is in liquidation.[126] Also, as recommended with respect to the situation where a trustee wishes to retire non-judicially without the appointment of a substitute trustee,[127] and as we shall recommend where a trustee is non-judicially discharged and a substitute trustee appointed,[128] we are of the view that the power to remove a trustee non-judicially without the appointment of a replacement should not be exercisable unless a trust corporation or at least two individual trustees would remain to perform the trust. While we have considered whether the non-judicial removal of a trustee should be permitted where only one individual trustee would remain in office, for reasons given when we dealt with a similar question in the context of non-judicial retirement,[129] we are of the view that this should only be possible by application to the court under the broad judicial power to remove a trustee from office to be recommended at a later stage of this chapter.[130]

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[122] See *infra*, this ch., sec. 1(g).

[123] Draft Bill, s. 19(2).

[124] *Letterstedt v. Broers* (1884), 9 A.C. 371 (P.C.).

[125] The Manitoba *Trustee Act*, *supra*, note 6, s. 10(5), provides for the non-judicial removal of a trustee without replacement of that trustee, which is consistent with the Manitoba legislative intent to prevent where possible the need for application to the court.

Accordingly, we recommend that the revised Act should provide that where a trustee refuses to act as trustee, is a mentally incompetent person, has been convicted of an indictable offence, is bankrupt, or where a person appointed a trustee disclaims the trust in writing, or where a corporate trustee is dissolved or is in liquidation, and does not voluntarily retire from the trust, his co-trustees should be able by deed to declare him to be removed from the trust, if a trust company or at least two individuals will then remain to act as trustees to perform the trust, and that the trustee should be discharged without any new trustee being appointed in his place.[131]

(d) LIABILITY OF FORMER AND CONTINUING TRUSTEES

We have previously recommended that a trustee should be able to retire or be removed with or without the appointment of a substitute trustee. Two issues of liability arise in these circumstances.

The first issue with which we are concerned is whether a trustee who has been discharged from office as a consequence of his retirement or removal is also discharged from liability for his own acts or omissions while in office, as well as from liability for the acts or omissions of his co-trustees during their concurrent time in office. Conversely, does the discharge serve to release the continuing co-trustees from the liability that they might otherwise have incurred in relation to the acts or omissions of the trustee who has retired or been removed? Case law does not exclude any such liability,[132] and the

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[126] Draft Bill, s. 19(1), sets out the circumstances in which we recommend non-judicial removal with replacement should be permitted. See, also, *supra*, this ch., sec. 1(b)(ii).

[127] See *supra*, this ch., sec. 1(a).

[128] See *infra*, this ch., sec. 1(g)(ii).

[129] See *supra*, this ch., sec. 1(a).

[130] See *infra*, this ch., sec. 1(f).

[131] Draft Bill, s. 25(3).

[132] See, generally, Pettit, *supra*, note 80, at 380.

Ontario *Trustee Act* contains no provisions relevant to this issue when the power to discharge and appoint trustees is exercised non-judicially. However, section 5 of the Ontario Act, which provides for the judicial appointment of new trustees, addresses this issue of liability directly in subsection (2) as follows:

> 5.—(2) An order under this section and any consequential vesting order or conveyance does not operate as a discharge from liability for the acts or omissions of the former or continuing trustees.

With respect to non-judicial retirement and removal, we see no reason why a discharge from office should necessarily operate as a discharge from liability in relation to conduct that occurred prior to the discharge, a view that does not appear to be inconsistent with the present common law. Although the act or omission may have prompted the discharge from office, the assessment of liability is a separate issue to be determined on the merits of the individual situation. We are of the opinion, therefore, that section 5(2) of the Ontario *Trustee Act* should be equally applicable to the non-judicial discharge and appointment of trustees. Accordingly, we recommend that, unless the court orders otherwise, the non-judicial retirement, removal, or replacement of a trustee and any consequential vesting order, declaration,[133] or conveyance should not discharge any person from liability for his own acts or omissions or for the acts or omissions of any former or continuing trustee.[134] The issues of trustee rights and indemnification, and the power of the court to excuse trustees from liability, are canvassed in greater detail in a later chapter.[135]

The second issue of liability involves the rights of a discharged trustee who may have been wrongfully removed from office. Liability may arise because the circumstance alleged as justification for the removal of the trustee and the appointment of a substitute trustee under section 3(1) of the Act did not in fact exist. Similarly, a trustee might be removed without the appointment of a substitute trustee, as previously recommended,[136] for a circumstance that in fact did not exist. In either case, the trustee would have been removed improperly, and in our view the revised Act should contain a provision authorizing recovery of damages against those responsible for the removal, although this action would not disturb the chain of trusteeship that has been set up by the appointment or discharge instruments. Accordingly, we recommend that where a trustee establishes before the court that the alleged circumstances on the basis of which he was removed as trustee did not in fact exist, he should be able to claim an appropriate award of damages for wrongful removal against those persons who caused his removal.[137]

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[133] See *infra*, this ch., sec. 3, for a discussion of vesting declarations and vesting orders.

[134] Draft Bill, s. 26.

[135] See *infra*, ch. 6.

[136] *Supra*, this ch., sec. 1(c).

[137] Draft Bill, s. 33.

(e) NON-JUDICIAL APPOINTMENT OF ADDITIONAL TRUSTEES

As we have discussed, section 3(1) of the Ontario *Trustee Act* provides for the non-judicial appointment of substitute trustees. When this occurs, another person or "other persons" may be appointed to replace the trustee who dies, retires, or is removed. In this way, the number of trustees may be increased non-judicially.[138] However, no provision exists in the Ontario legislation for the non-judicial appointment of additional trustees where no replacement is sought. Unless there is an express power in the instrument to appoint additional trustees, an application to the court would be required under section 5 of the *Trustee Act* for the judicial appointment of additional trustees.[139]

By way of contrast, section 36(6) of the English *Trustee Act, 1925* does provide for the non-judicial appointment of additional trustees. The subsection states as follows:

> 36.—(6) Where a sole trustee, other than a trust corporation, is or has been originally appointed to act in a trust, or where, in the case of any trust, there are not more than three trustees (none of them being a trust corporation) either original or substituted and whether appointed by the court or otherwise, then and in any such case –
>
> (*a*) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or
>
> (*b*) if there is no such person, or no such person able and willing to act, then the trustee or trustees for the time being;
>
> may, by writing, appoint another person or other persons to be an additional trustee or additional trustees, but it shall not be obligatory to appoint any additional trustee, unless the instrument, if any, creating the trust, or any statutory enactment provides to the contrary, nor shall the number of trustees be increased beyond four by virtue of any such appointment.

This power appears in all Commonwealth Trustee Acts that have been revised since 1925.[140] Its utility seems apparent, as there may well be circumstances where it would be advantageous to be able to appoint an additional trustee without an application to the court, for example, to fill a vacancy resulting from the retirement of a trustee under section 2 of the Ontario *Trustee Act*. We, therefore, recommend that a non-judicial power to appoint additional trustees should be introduced in the revised Act.[141]

As to who should be empowered to appoint additional trustees, section 36(6) of the English *Trustee Act, 1925* provides that the persons so entitled are the persons nominated by the instrument, or, failing such a person, "the trustee or trustees for the time being", and we recommend that this should also be the case under the revised Ontario *Trustee Act*.[142] Although this description of the entitled persons does not appear to have given rise to any difficulty, consistent with our view concerning which trustees should be entitled to appoint substitute trustees, we further recommend that a person who in writing disclaims the trust, or who, having neither disclaimed nor resigned, refuses to act as trustee, should not be entitled to appoint additional trustees.[143]

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[138] *Trustee Act*, *supra*, note 3, ss. 3(1) and 6(*a*).

[139] See *In re Gregson's Trusts* (1886), 34 Ch. D. 209.

[140] See, for example, the Manitoba *Trustee Act*, *supra*, note 6, s. 10(4); the New Zealand *Trustee Act 1956*, *supra*, note 6, s. 43(5); and the New South Wales *Trustee Act, 1925*, *supra*, note 6, s. 7.

[141] Draft Bill, s. 21.

We also consider that certain other features of section 36(6) of the English Act should not be adopted. First, section 36(6) of the English Act does not apply where a trustee is a trust corporation. Therefore, under the English Act it is not possible to appoint a trustee in addition to a trust corporation. The English trustee legislation provides that only a trust corporation may act as a sole trustee, but this does not appear to imply that the corporation must act alone; nor does it explain why it should not be possible to make a non-judicial appointment of an additional trustee when one of the trustees is a trust corporation. It should be noted that the English Law Reform Committee in its recent *Report on the Powers and Duties of Trustees* has recommended that the restriction on the appointment of additional trustees where a trust corporation is the original sole trustee, or is one of the existing trustees, should be removed.[144] We agree with this position and recommend that, unlike the position under section 36(6) of the English *Trustee Act, 1925*, it should be possible under the revised Act to appoint a trustee in addition to a corporate trustee.[145]

Secondly, we wish to refer to a difference between section 36(6) and section 36(1) of the English *Trustee Act, 1925*. Under section 36(6) the nominated persons have power to appoint "another person or other persons" to be an additional trustee or additional trustees. By way of contrast, section 36(1), like section 3(1) of the Ontario *Trustee Act*, provides that those who are entitled to appoint may appoint one or more other persons "whether or not being the persons exercising the power" to replace a deceased, retiring, or removed trustee. We see no reason why those entitled to appoint should be able to name themselves substitute trustees, but unable to appoint themselves additional trustees. This distinction was not adopted in Northern Ireland,[146] and, indeed, may not have been intended in the English legislation.[147] In fact, the English Law Reform Committee has recently recommended that the person or persons who have the power to appoint additional trustees should be able to appoint themselves as additional trustees.[148] Accordingly, we recommend that, consistent with section 3(1) of the Ontario *Trustee Act*, the revised Act should permit the persons nominated by the trust instrument to appoint themselves as additional trustees.[149]

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[142] *Ibid.*

[143] *Ibid.* See, also, *supra*, this ch., sec. 1(b)(i).

[144] Law Reform Committee, *Twenty-third Report: The Powers and Duties of Trustees* (Cmnd. 8733, October, 1982), at 4-5 and 62 (hereinafter referred to as "English Law Reform Committee Report").

[145] Draft Bill, s. 21.

[146] *Trustee Act (Northern Ireland), 1958*, *supra*, note 30, s. 35(6).

[147] See *In re Power's Settlement Trusts*, [1951] 1 Ch. 1074, [1951] 2 All E.R. 513 (C.A.). See, also, Sheridan, "The Trustee Act, 1966" (1965), 4 The Solicitor Quarterly 186, at 193 *et seq*.

Thirdly, we would point out that section 36(6) of the English *Trustee Act, 1925* provides that, where there is an appointment of an additional trustee, the number of trustees shall not "be increased beyond four by virtue of any such appointment". As will be discussed in a later section of this chapter, the English legislation provides that, as a general rule, no more than four persons can act as original trustees. However, this limitation is, with certain exceptions, only applicable to "settlements and dispositions of land".[150] The inclusion of these words in section 36(6) not only carries over this limitation to the appointment of additional trustees, but also renders it applicable to trusts of personalty. We later recommend that, except with the consent of the court, the number of trustees at any one time should not be greater than four, a recommendation that applies not only to trusts of land, but also to trusts of personalty, and however and whenever the trustees are appointed.[151] Accordingly, the section of our Draft Bill that deals with the appointment of additional trustees does not contain these words of section 36(6) of the English Act, but is governed by a reference to the recommended provision generally limiting the number of trustees.[152] We recommend that this approach be adopted in the revised Act.[153]

(f) JUDICIAL REPLACEMENT, REMOVAL, AND APPOINTMENT OF TRUSTEES

The power of the court to replace, remove, and appoint trustees is set out in section 5 of the Ontario *Trustee Act*, which provides as follows:

> 5.—(1) The Supreme Court may make an order for the appointment of a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee.
>
> (2) An order under this section and any consequential vesting order or conveyance does not operate as a discharge from liability for the acts or omissions of the former or continuing trustees.

This provision empowers a court in its discretion to appoint substitute and additional trustees. Section 5 is both similar and dissimilar to section 3(1) of the Act. Unlike the non-judicial power contained in section 3(1), the judicial power contained in section 5 does not list the circumstances in which it becomes exercisable, but leaves the matter to the discretion of the court. Like section 3(1), the court may remove a trustee under section 5 only where it appoints a substitute trustee.

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[148] English Law Reform Committee Report, *supra*, note 144, at 4-5 and 62.

[149] Draft Bill, s. 21.

[150] *Trustee Act, 1925*, *supra*, note 5, s. 34. See, also, *infra*, this ch., sec. 1(g)(i).

[151] See *infra*, this ch., sec. 1(g)(i), and Draft Bill, s. 18.

[152] Draft Bill, s. 21.

[153] Under s. 36(6) of the English *Trustee Act, 1925*, *supra*, note 5, the power to appoint additional trustees is exercisable, *inter alia*, where "a sole trustee" has been appointed, or where there are "not more than three trustees". Our later recommendation, that the number of trustees should not be greater than four, would render these words otiose in the setting of the revised Act, and we also recommend their omission.

We agree with the retention of a general statutory provision of this nature as a necessary support to the non-judicial mode of appointment. Accordingly, we recommend that the revised Act should contain a judicial power of removal and appointment based upon section 5 of the existing Act, which would enable the court to appoint one or more trustees where there is no existing trustee or uncertainty as to the existence or identity of any trustee or in substitution for or in addition to one or more existing trustees.[154] However, we consider that the present provision requires amendment in several respects before being carried forward to the revised Act.

The equivalent provision in the English *Trustee Act, 1925* is section 41(1). This section enumerates, for greater particularity, several circumstances in which the court may exercise its power to appoint a trustee, namely, in substitution "for a trustee who is incapable, by reason of mental disorder within the meaning of the Mental Health Act 1959, of exercising his functions as trustee, or is a bankrupt, or is a corporation which is in liquidation or has been dissolved". It should be noted that the particularity of section 41(1) of the English Act is expressed to be without prejudice to the generality of the judicial appointment and removal power authorized by the section. The reason that bankruptcy, liquidation, and dissolution are enumerated in the English section may be that these circumstances are not listed specifically in section 36(1) of the English *Trustee Act, 1925*,[155] which contains the non-judicial power to appoint substitute trustees. On the other hand, the Ontario non-judicial statutory appointment power that we recommend authorizes removal in these circumstances.[156] Section 5 of the present Ontario Act does not specify the circumstances in which the judicial power may be exercised, and, on balance, we see no useful purpose in the adoption of a particularized approach in the revised Act.

Another matter that we have considered concerns the scope of the judicial power. Section 41(1) of the English Act provides that the court has jurisdiction only when "it is expedient to appoint a new trustee or new trustees, and it is found inexpedient difficult or impracticable so to do without the assistance of the court". The purpose of these words, which do not appear in section 5 of the Ontario Act,[157] is not merely to encourage, but rather to compel, the exercise of the non-judicial power by withholding jurisdiction from the court where inexpedience, difficulty, or impracticability do not exist.[158] The Commission has considered whether such an approach should be taken in Ontario. Of the other eleven common law jurisdictions in Canada, only Prince Edward Island and New Brunswick do not include in their trustee legislation the words of the English section.[159] These words also find their place in the legislation of Northern Ireland[160] and New Zealand,[161] and in the legislation of four of the six Australian states, including Victoria and Western Australia.[162]

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[154] Draft Bill, s. 56(1)(*b*).

[155] However, it has been held that a trustee who is bankrupt is unfit to act within the meaning of s. 36(1) of the English *Trustee Act, 1925*, *supra*, note 5: see, *In re Hopkins* (1881), 19 Ch. D. 61 (C.A.).

[156] Draft Bill, s. 19(1).

[157] The Ontario section once contained this phrase, but it was dropped in the 1926 consolidation of *The Trustee Act, 1926*, 16 Geo. 5, c. 40, s. 6. In England, these words are to be found in the original enactment of the statutory judicial power: see *The Trustee Act, 1850*, *supra*, note 5, s. 32. See, also, *The Trustee Act, 1852*, *supra*, note 5, s. 9. These Acts preceded the introduction of the statutory non-judicial power in 1860.

It can, however, be contended that the Ontario section should remain unchanged, and that the courts could discourage unnecessary applications by awarding costs, other than as against the trust estate. On the other hand, if, as we have earlier recommended, there is to be a non-judicial power in the revised Act and it is to be made adequate for contemporary needs, application to the court should be unnecessary unless there exist exceptional circumstances. We have concluded that resort should be had to the judicial power only in exceptional circumstances, and we are of the view that this could be achieved if the revised Act were to provide that a judicial removal or appointment of a trustee should be made only where it appears to the court to be in the best interests of a trust and where appointment or removal would be inexpedient, difficult or impracticable without the assistance of the court. We so recommend.[163]

A third matter that we have considered is whether the power to remove a trustee under section 5 of the Ontario *Trustee Act* should be capable of exercise in the absence of appointment of a substitute trustee. It will be recalled that, at present, there is no statutory power in the Ontario Act authorizing either the judicial or non-judicial removal of a trustee without the appointment of a substitute trustee. Although the court has an inherent jurisdiction to so remove a trustee,[164] we are of the view that this power should be placed in statutory form and incorporated in the revised Act. Such a provision would be complementary to the recommended non-judicial power of removal without the appointment of a substitute trustee.[165] As with the appointment of new trustees, we would seek to encourage the use of the non-judicial power in the circumstances recommended, and resort to judicial proceedings only in exceptional cases. Accordingly, we recommend that the revised Act should provide that, where it appears to the court to be in the best interests of a trust, the court should be able to remove one or more trustees, with or without the appointment of substitute trustees.[166]

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[158] An English court invited to remove or appoint under the inherent jurisdiction, the statutory jurisdiction not being invocable, would probably refuse to order a removal or make an appointment on the ground that Parliament had made its intention clear.

[159] *Trustee Act*, R.S.B.C. 1979, c. 414, s. 31; *Trustee Act*, R.S.A. 1980, c. T-10, s. 16(1); *The Trustee Act*, R.S.S. 1978, c. T-23, s. 14; Manitoba *Trustee Act*, *supra*, note 6, s. 11(1)(a); *Trustee Act*, R.S.N.S. 1967, c. 317, s. 30; *The Trustee Act*, R.S.N. 1970, c. 380, s. 34(1); *Trustee Ordinance*, R.O.Y.T. 1978, c. T-5, s. 10(1); and *Trustee Ordinance*, R.O.N.W.T. 1974, c. T-8, s. 7(1).

[160] *Trustee Act (Northern Ireland), 1958*, *supra*, note 30, s. 40.

[161] *Trustee Act 1956*, *supra*, note 6, s. 51.

[162] *Trustee Act 1958*, Vict. Stat. Vol. 8, No. 6401, s. 48; *Trustees Act, 1962*, *supra*, note 6, s. 77; *Trustee Act, 1936-1974*, S. Austl. Stat. 1936-1974, s. 36; and *Trustee Act 1898*, Tasm. Stat. 1826-1974, s. 32.

[163] Draft Bill, s. 56(1).

[164] See *Letterstedt v. Broers*, *supra*, note 124.

[165] Draft Bill, s. 25(3). See, also, *supra*, this ch., sec. 1(c).

With respect to the exercise of the statutory judicial power, we later recommend that this power should be a power to appoint one or more trustees, and that there should be no restriction on the number so appointed.[167] Also, we shall recommend that, in exercising the power to remove a trustee, the court should be given a broad power to determine the permissible minimum number of trustees that may remain in office after a trustee is removed, having regard to the best interests of the trust.[168]

Finally, we support the incorporation in the revised Act of the principles contained in subsection (2) of section 5 of the present Act, namely, that the judicial appointment of a new trustee does not operate as a discharge from liability for the acts or omissions of the former or continuing trustees. Indeed, we have earlier recommended that this subsection, which in the present Act is applicable only to the judicial appointment of new trustees, be expanded in the revised Act to apply also to the non-judicial retirement, removal, or replacement of a trustee.[169] Accordingly, we recommend that in the revised Act this provision should apply in the event of the court exercising its power of removal and appointment of trustees.[170]

(g) THE NUMBER OF TRUSTEES

Any reform of the law of trusts must seek to promote efficient management of the trust. This goal raises the issue of the number of trustees who should be permitted to hold office at any one time. First, we shall discuss whether there should be a limitation on the number of trustees who may act at any one time, and then we shall turn to consider the issue of the permissible minimum number of trustees.

(i) Maximum Number of Trustees

The Ontario *Trustee Act* places no restriction on the number of trustees who may be originally appointed by the creator of the trust. There is similarly no limitation on the number of new trustees who may be appointed, either non-judicially under section 3(1) to replace a trustee who has died, retired, or has been removed for cause, or judicially under section 5 of the Act, either in substitution for or in addition to any existing trustee.[171] Indeed, section 6(*a*) of the Ontario *Trustee Act* provides as follows:

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[166] Draft Bill, s. 56(1)(*a*).

[167] See *infra*, this ch., sec. 1(g)(i).

[168] See *infra*, this ch., sec. 1(g)(ii).

[169] Draft Bill, s. 26. See, also, *supra*, this ch., sec. 1(d).

[170] Draft Bill, s. 56(2).

> 6. On the appointment of a new trustee for the whole or any part of trust property,
>
> (*a*) the number of trustees may be increased; . . .

This is not the case, however, in certain other Commonwealth jurisdictions, where the number of trustees is limited to four,[172] although the rationale for such a restriction differs among jurisdictions. For example, the English *Trustee Act, 1925* provides, as a general rule, that there can be no more than four trustees whether by original,[173] substitute,[174] or additional[175] appointment, and whether the additional appointment is made judicially or non-judicially. However, in the case of an original appointment, the limitation is, with certain exceptions, only applicable to "settlements and dispositions of land",[176] and does not apply to trusts involving personalty.[177]

This limitation on the number of trustees was part of the English movement in 1925 to simplify conveyancing; in England, co-ownership of land can exist only by way of a trust for sale, and legal title, which can be held only in joint tenancy, would be concentrated in a few hands if only four trustees were permitted.[178] As we have noted, the reform of land law that took place in England has not necessarily been followed in other Commonwealth jurisdictions, and this is particularly true of Ontario and common law Canada, although in this respect there has been recent legislation of interest in Manitoba[179].

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[171] *Trustee Act, supra*, note 3, ss. 3(1), 5, and 6(*a*).

[172] See, for example, the English *Trustee Act, 1925, supra*, note 5, ss. 34 and 36(6); New South Wales *Trustee Act, 1925, supra*, note 6, s. 6(5); Western Australia *Trustees Act, 1962, supra*, note 6, s.7(2)(a); Queensland *Trusts Act 1973*, Queensl. Stat. 1973, No. 24, s. 11; and Victoria *Trustee Act 1958, supra*, note 162, s. 40.

[173] *Trustee Act, 1925, supra*, note 5, s. 34.

[174] *Ibid.*, s. 36(1).

[175] *Ibid.*, s. 36(6).

[176] *Ibid.*, s. 34(3). Subsection 34(3) further provides for three exceptions to the limitation imposed on the number of trustees, stating that the limitation does not apply:

> (*a*) in the case of land vested in trustees for charitable, ecclesiastical, or public purposes; or
>
> (*b*) where the net proceeds of the sale of the land are held for like purposes; or
>
> (*c*) to the trustees of a term of years absolute limited by a settlement on trusts for raising money, or of a like term created under the statutory remedies relating to annual sums charged on land.

See, also, Victoria *Trustee Act 1958, supra*, note 162, s. 40.

[177] It should be noted, however, that in the case of the appointment of additional trustees under s. 36(6) of the English *Trustee Act, 1925, supra*, note 5, the restriction imposed upon the number of trustees applies equally to trusts of mixed personalty and realty.

[178] See *Law of Property Act, 1925, supra*, note 100, ss. 34-36.

[179] See *The Perpetuities and Accumulations Act*, Bill 46 (32d Leg. 2d Sess.), which, in addition to repealing the rules against accumulations and perpetuities, provides, in section 4, that successive legal interests will take effect as interests behind a trust. The Act (S.M. 1982-83, c. 43) received Royal Assent on August 18, 1983 and was declared in force October 1, 1983. The Act follows the recommendations of the Manitoba Law Reform Commission in its *Report on the Rules Against Accumulations and Perpetuities* (Report No. 49, February 12, 1982).

For example, in Queensland, the limitation with respect to the maximum number of trustees is applicable to all trusts, and not just those composed of realty. In that jurisdiction it is provided that trusts made or coming into operation after the commencement of the Act shall not have more than four trustees, and where more than four persons are named as trustees, the four first named shall alone act as the trustees.[180]

It is interesting to note that the English Law Reform Committee, in its recent *Report on the Powers and Duties of Trustees*, has recommended that, "where the settlor makes no specific provision about the number of trustees, they should be limited to four regardless of the nature of the trust property, subject to the existing restrictions in the case of trusts for sale of land and settled land and to the exceptions presently contained in section 34(3)(*a*) of the *Trustee Act 1925*". However, unlike the approach adopted in Queensland, the English Law Reform Committee was of the view that it should be open to the settlor to provide expressly for as many trustees as he wished subject to the existing restrictions in the case of trusts for sale of land and settled land.[181]

The Commission has considered this matter, and, with regard to the non-judicial appointment of trustees, is of the view that, except with the consent of the court, it would be desirable for several reasons to limit the number of trustees who may be appointed. We are of the opinion that a trustee has a distinct function to perform in the active management of a trust – that is, to carry out efficient, objective administration. Accordingly, he should not be perceived as representing particular interests. To permit an unlimited number of trustees might be to encourage the appointment of persons who have no interest in the day to day management of the trust, but whose sole function would be to represent, for example, numerous beneficial interests with perceived different concerns. In our view, such a situation misconstrues the function of trusteeship. Moreover, in addition to participating in the active administration of the trust, trustees are required to consent to all proposals relating to the management of the trust and its property. An inordinate number of trustees could make such a task difficult and render the administration of the trust unnecessarily slow, complex, and expensive.[182] This reasoning seems equally applicable whether trusts of realty or personalty are involved, and whether the trustees are original, substitute, or additional.

The Commission is also of the view that the proposed limitation on the number of trustees should be mandatory; that is, it should apply notwithstanding the expression of a contrary intent in the instrument. We recognize, however, that circumstances may vary greatly. For this reason, we are of the opinion that any interested party should be able to apply to the court for consent to appoint more than four trustees under the non-judicial appointment power. Accordingly, we recommend that the revised Act should contain a provision to the effect that, except with the consent of the court, and notwithstanding an expression of a contrary intent in the trust instrument, no trust shall have more than four trustees at any one time.[183] We further recommend that, if more than four persons are originally named as trustees, the first four named who are able and willing to act should alone be the trustees, and the other persons named should not be trustees unless appointed on the occurrence of a vacancy or with the consent of the court.[184] Finally, as these recommendations represent a substantial departure from present Ontario law, we are of the view that, if they are accepted, they should only apply to trusts that take effect after any revised Act containing these recommendations comes into force, and we so recommend.[185]

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[180] Queensland *Trusts Act 1973*, *supra*, note 172, s. 11.

[181] English Law Reform Committee Report, *supra*, note 144, at 62 and 3.

[182] The Queensland Law Reform Commission, in its *Report on the Law Relating to Trusts, Trustees, Settled Land and Charities* (No. 8, 1971), at 13, stated, as the reason for recommending a limitation upon the number of trustees, that "in practice a multiplicity of trustees is productive of considerable expense, delay and inconvenience, particularly where conveyancing is involved and where re-vesting of trust property is necessitated by successive deaths of trustees". See, also, the English Law Reform Committee Report, *supra*, note 144, at 3, where the Committee, in recommending that the number of trustees should be limited to four regardless of the nature of the trust property, stated that "when the number of trustees exceeds four, costs, administrative inconvenience and delays are increased".

It is apparent that section 6(*a*) of the Ontario *Trustee Act* is inconsistent with the above recommendations, and, in relation to the non-judicial appointment of trustees, we recommend that the provision should not be carried over to the revised Act.

With respect to the judicial appointment of new trustees, whether by way of substitution or addition, we are of the view that the number of trustees so appointed should be left to the discretion of the court, and we so recommend.[186] This recommendation is consistent with our previous recommendation relating to the court's power to consent to an increase beyond the proposed statutory limit in the number of trustees appointed non-judicially. We would also note that this recommendation incorporates the principle of section 6(*a*) in relation to the judicial appointment of trustees and, therefore, renders this provision unnecessary in the revised Act. Accordingly, as with non-judicial appointments, but for these different reasons, we recommend that section 6(*a*) not be carried over to the revised Act.

(ii) Minimum Number of Trustees

We now turn to consider the issue of the minimum number of trustees that should be permitted under the revised *Trustee Act*. Where judicial intervention is not sought, this issue could arise in two situations: first, where a trustee is non-judicially discharged and a substitute trustee appointed under section 3(1) of the present Act; and secondly, where a trustee dies or proposes to retire non-judicially under section 2(1) of the present Act or, pursuant to our previous recommendation,[187] is removed without the appointment of a substitute trustee.

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[183] Draft Bill, ss. 18(1) and 17(2).

[184] *Ibid.*, s. 18(2).

[185] *Ibid.*, s. 17(3).

[186] *Ibid.*, s. 56(1)(*b*). Section 56(1)(*b*) provides that the court may appoint "one or more trustees", and does not limit this judicial power.

[187] See *supra*, this ch., sec. 1(c), and Draft Bill, s. 25(3).

At present, section 6(*c*) of the Ontario *Trustee Act* addresses the issue of the minimum number of trustees where a trustee is to be non-judicially discharged and a substitute trustee appointed. The section provides as follows:

> 6. On the appointment of a new trustee for the whole or any part of trust property,
>
> . . . .
>
> (*c*) it is not obligatory to appoint more than one new trustee where only one trustee was originally appointed or to fill up the original number of trustees where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under section 3 from his trust unless there will be a trust company or at least two individuals as trustees to perform the trust;

The first portion of this subsection contains general provisions that are applicable to both judicial and non-judicial appointments. It authorizes the appointment of only one substitute trustee, where there was only one trustee originally appointed. The court or the appointor may appoint more, but it is not necessary to do so. If, on the other hand, there were originally more than two trustees, the court or the appointor need not appoint the number previously holding office. The second part of the subsection is more particular in nature, and only applies where a trustee is to be discharged and a substitute trustee appointed non-judicially under section 3 of the Act. In that case, unless there was only one trustee originally appointed, no discharge may be granted without there being a trust corporation or at least two individual trustees to perform the trust.

We agree in general with the principles contained in section 6(*c*) so far as they relate to the non-judicial discharge and appointment of substitute trustees, and believe they should be retained in the revised Act.[188]

It should be noted that section 6(*c*) of the present *Trustee Act* does not deal with the issue of the minimum number of trustees where a trustee dies, proposes to retire non-judicially, or where it is proposed to remove a trustee non-judicially, without the appointment of a substitute trustee. In previous discussions, we have endorsed, in general, the principle that, subject to a contrary intention in the trust instrument, there should always be not less than two individual trustees or a trust company to perform the trust.[189] We are of the view that this principle should apply in all cases where two or more trustees are originally appointed by a trust instrument; that is, we consider that two individuals or a trust company should be the minimum number of trustees permitted to administer the trust, unless a contrary intention is expressed in the trust instrument.[190] If the number of individual trustees falls to one, for example, upon the death of a co-trustee, the one individual trustee should be prohibited from acting alone, unless he receives the consent of the court to continue as a sole trustee.

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[188] Draft Bill, s. 23.

[189] Concerning the situation where a trustee retires non-judicially without being replaced, see *supra*, this ch., sec. 1(a); where a trustee is non-judicially removed without the appointment of a replacement, see *supra*, this ch., sec. 1(c); and where a trustee is non-judicially discharged and a substitute trustee appointed, see *supra*, this ch., this sec.

[190] See discussion *supra*, this ch.

Accordingly, we recommend that the revised Act should provide that it is not necessary for more than one trustee to be appointed by way of substitution where only one trustee was originally appointed, but, except where only one trustee was originally appointed, a non-corporate trustee shall not act alone, and a trustee is not to be discharged unless there will be either a trust company or two or more individuals to act as trustees.[191] However, we consider that it should be possible to apply to the court for consent to continue to act as a sole trustee, and we so recommend.[192]

It will be noted that we have not incorporated in our draft section that part of section 6(*c*) that provides that "it is not obligatory . . . to fill up the original number of trustees where more than two trustees were originally appointed". We are of the view that this provision is not directly related to the issue of the minimum number of trustees but, rather, may be readily deduced from the application of the proposed provisions governing the permissible maximum and minimum number of trustees.

So far as concerns the judicial removal of trustees, we recommend that no statutory restrictions should be imposed. Rather, the court in its discretion should determine the permissible minimum number of trustees that may remain in office, having regard to the best interests of the trust.[193]

(h) SUPPLEMENTARY PROVISIONS APPLICABLE TO NON-JUDICIAL AND JUDICIAL APPOINTMENT OF TRUSTEES

Sections 6 and 7 of the Ontario *Trustee Act* contain provisions that are applicable to both the non-judicial and the judicial appointment of new trustees under section 3(1) and section 5 of the Act, respectively. Sections 6(*a*) and (*c*) have been commented upon previously in the context of other recommendations,[194] and they need not concern us here. The remaining provisions require consideration at this time.

First, sections 6(*b*) and (*d*) of the Ontario *Trustee Act* provide as follows:

> 6. On the appointment of a new trustee for the whole or any part of trust property,
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> . . . .
>
> (*b*) a separate set of trustees may be appointed for any part of the trust

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[191] Draft Bill, s. 23. This section is subject to the general provision, contained in s. 2(*b*) of the Draft Bill, that it applies if and so far only as a contrary intention is not expressed in the trust instrument.

[192] Draft Bill, s. 57(1).

[193] *Ibid.*, s. 56(1). Section 56(1)(*a*) places no restriction upon the number of trustees that may be removed by the court.

[194] See *supra*, this ch., sec. I(g)(i) and (ii).

> property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part; and
>
> . . . .
>
> (*d*) any assurance or thing requisite for vesting the trust property, or any part thereof, in the person who is the trustee, or jointly in the persons who are the trustees, shall be executed or done.

Although subsection (*d*) has not been discussed previously, the principle it espouses finds its place in the effect that we propose should be afforded a vesting declaration.[195]

Subsection (*b*) of section 6 concerns the appointment of a separate set of trustees for any part of the trust property held on trusts distinct from those relating to any other part of the trust property. Although this subsection has not been the subject of previous discussion, the principle it embraces was considered in the context of the retirement of a trustee. We there stated that the principle of separate trustees for distinct trust assets was a sound one and, accordingly, recommended that a trustee should be permitted to retire from a part of the trust, and remain as trustee of the other part or of other parts, provided that the parts of the trust reflect separate property held on distinct trust terms.[196] The principle contained in section 6(*b*) now applies to the appointment of a substitute trustee. We would retain the principle and, in the revised Act, would apply it to the appointment of both substitute and additional trustees. We would, however, except with the consent of the court, restrict the number of trustees appointed for each separate part of the trust to our previously recommended limit of four.[197] Accordingly, we recommend that the revised Act should contain a provision to the effect that where it would assist in the administration of the whole or any part of a trust or where it would benefit beneficiaries of a trust, one or more separate trustees may be appointed, whether any such person or persons be an original, substitute or additional trustee or trustees, for any part of the trust property held on trusts distinct from those relating to any other part, but a separate sole trustee should be appointed in those circumstances only where a sole trustee was originally appointed, and for each separately administered part the limitation upon the number of trustees, earlier recommended, should apply.[198]

The second provision that we wish to consider is section 7 of the Ontario *Trustee Act*, which concerns the powers of new trustees, and provides as follows:

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[195] See *infra*, this ch., sec. 3(a).

[196] See *supra*, this ch., sec. 1(a).

[197] See *supra*, this ch., sec. 1(g)(i).

[198] Draft Bill, s. 22.

> 7. Every new trustee so appointed, as well before as after all the trust property becomes by law or by assurance or otherwise vested in him, has the same powers, authorities and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

The utility of this type of provision is obvious. In the English *Trustee Act, 1925*, this section appears twice, once for non-judicial appointments and a second time for judicial appointments.[199] We see no particular need for this duplication, provided that it is clear that section 7 applies to both modes of appointment. Accordingly, we recommend that the revised Act should contain a provision to the effect that every substitute or additional trustee appointed under the Act, both before and after the trust property becomes vested in him, has the same powers, authorities, and discretions and may in all respects act as if he had been originally appointed a trustee by the trust instrument.[200]

2. EVIDENCE OF CHANGE OF TRUSTEES

If, as we propose, use of the non-judicial appointment and discharge power is to be encouraged, third parties must be afforded protection against improperly appointed trustees. In the exercise of their powers, in particular the power of investment, trustees have frequent dealings with third parties involving, for instance, the purchase and sale of securities. A third party participating in any such transaction will wish to know whether the persons who purport to convey title, or to give a discharge for the receipt of purchase money, have been properly appointed trustees. In the case of original trustees, the trust instrument is available to a third party for this purpose. Further, where trustees have been judicially appointed under section 5 of the Ontario *Trustee Act*, the order of the court can be shown to a third party, and he is entitled to rely upon the order absolutely.[201] The Ontario Act, however, provides no evidentiary protection to a third party dealing with substitute trustees appointed under section 3(1), and the third party must satisfy himself that each of the trustees was properly appointed. The absence of such a protective provision seems to explain, in part, the apparently modest use that is made in Ontario of the non-judicial appointment power. No matter how efficient the procedure is for the replacement, removal, and addition of trustees, this situation will, no doubt, continue unless a protective provision is included in the revised Act.

Section 38 of the English *Trustee Act, 1925* is a response to the problem, and provides as follows:

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[199] *Trustee Act, 1925*, *supra*, note 5, ss. 36(7) and 43.

[200] In the Draft Bill this recommendation appears in Part III, Appointment and Discharge of Trustees by Act of the Parties, as s. 24. In the event of the court exercising its powers to remove or appoint new trustees in Part VII of the Draft Bill, s. 24 is rendered applicable by s. 56(2) of the Draft Bill.

[201] Any order or judgment of the court will protect and indemnify any person acting thereon, provided that the person is so relying in good faith: see the *Judicature Act*, R.S.O. 1980, c. 223, s. 142. See, also, the *Conveyancing and Law of Property Act*, R.S.O. 1980, c. 90, s. 60.

> 38.—(1) A statement, contained in any instrument coming into operation after the commencement of this Act by which a new trustee is appointed for any purpose connected with land, to the effect that a trustee has remained out of the United Kingdom for more than twelve months or refuses or is unfit to act, or is incapable of acting, or that he is not entitled to a beneficial interest in the trust property in possession, shall, in favour of a purchaser of a legal estate, be conclusive evidence of the matter stated.
>
> (2) In favour of such purchaser any appointment of a new trustee depending on that statement, and any vesting declaration, express or implied, consequent on the appointment, shall be valid.

The section makes a deliberate choice in favour of a purchaser, and passes to the trust beneficiaries the risk that unauthorized persons are acting as trustees. In favour of a purchaser, a statement of the occurrence of a circumstance rendering exercisable the replacement power is conclusive evidence of the matter stated, and any appointment depending on the statement is declared valid by the section. If, for instance, a trustee has not been absent from the United Kingdom for twelve months, or if his alleged refusal to act was merely his unwillingness to agree with a course of action proposed by his co-trustees, a purchaser may, nonetheless, accept at face value the written statement in the instrument appointing the new trustee, and the trust beneficiaries cannot trace the trust property into the purchaser's hands. This protection no doubt contributes to the use of the non-judicial power as the usual method of appointment of trustees in England.

After careful consideration, the Commission has concluded that, having recommended the retention of a non-judicial appointment power, some protection must be provided to a purchaser of trust property if the non-judicial power is to be effective. While section 38 of the English *Trustee Act, 1925* has been in operation in England for over fifty years, and while a similar provision has been adopted in a large number of Commonwealth jurisdictions,[202] the section, in the view of the Commission, does suffer from certain shortcomings. Accordingly, we consider that a provision designed to protect a purchaser against improperly appointed trustees should be made more comprehensive and, therefore, more effective.

The first deficiency of section 38 of the English *Trustee Act, 1925*, in our view, is that it applies only where a trustee is appointed for any purpose connected with "land", and only in favour of a purchaser of a "legal estate". The probable explanation for these restrictions, as we have remarked previously, is that the major objective of the English property legislation in 1925 was to remove all beneficial interests from the concern of a purchaser of the legal estate and so simplify and reduce the cost of conveyancing. The policy of the legislation, at least in this context, did not extend either to equitable interests in land or to personalty. In the case of each of these two property interests, we consider the section to be deficient for Ontario purposes today.

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[202] See, for example, the Manitoba *Trustee Act*, *supra*, note 6, s. 14; the New Zealand *Trustee Act 1956*, *supra*, note 6, s. 44; the New South Wales *Trustee Act, 1925*, *supra*, note 6, s. 13; and the Victoria *Trustee Act 1958*, *supra*, note 162, s. 43.

As to the first point, the Manitoba *Trustee Act*[203] and the *Trustee Act (Northern Ireland), 1958*[204] make the section applicable to both legal and equitable interests in land, and we agree with this approach. The object of the section is to protect a *bona fide* purchaser and, since the revised Act is not concerned with the policy of conveyancing simplification that was the object of the 1925 English reformers, we have concluded that the section in the revised Act should apply to both legal and equitable interests in property.

We also consider the non-application of section 38 to personalty to be unsatisfactory.[205] Today, by far the most familiar form of trust property in Canada is personalty and, in particular, securities. It is, therefore, important to establish whether the difficulties that section 38 of the English legislation was designed to overcome also exist in relation to this kind of property.

By way of illustration, assume that A, B, and C are trustees and the registered owners of shares of a corporation. Assume also that C is removed as trustee for one of the reasons set out in section 3(1) of the Ontario *Trustee Act*, and that D is appointed in his place. At present, A and B would endorse the share certificates standing in the names of A, B, and C and present them, together with a copy of the appointment instrument, to the transfer agent of the corporation for registration in the names of A, B, and D.

For its part, the corporation is under a duty to register the transfer if a security is presented to it and, *inter alia*, it is "endorsed by the appropriate person" and "reasonable assurance is given that that endorsement is genuine and effective".[206] The Ontario *Business Corporations Act, 1982* defines "appropriate person", in the case of a trustee, to mean either the original sole trustee or his successor or, where there is more than one original trustee, then the trustees remaining after the discharge of a trustee.[207] The corporation is not obliged to proceed on the signatures of the endorsing trustees unless it receives "reasonable assurance" that their endorsements are "genuine and effective".[208] "Reasonable assurance" is defined in the Act and includes "appropriate evidence of appointment or incumbency" or "assurance appropriate to the case equivalent as nearly as may be to those required by this section".[209] In the case of a fiduciary, the expression "appropriate evidence of appointment or incumbency" is further defined and involves the production and deposit of proof of the transmission of office and vesting of trust property in the new trustees together with a sworn statement of the facts alleged.[210] The requisite degree of proof of appointment is in the discretion of the corporation and, in essence, amounts to a reasonable assurance that the appropriate persons have presented it with a transfer for registration. Once the corporation is satisfied, the duty to register the transfer arises and, indeed, the corporation is subject to liability for failure to register or undue delay in registration.[211]

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[203] Manitoba *Trustee Act*, *supra*, note 6, s. 14.

[204] *Supra*, note 30, s. 37.

[205] It is interesting to note that the English *Law of Property Act, 1925*, *supra*, note 100, converted all joint tenancies and tenancies in common of legal interests in land (freehold or leasehold) into "statutory trusts" for the tenants, but, except in the case of the legal tenancy in common of a chose in action where a common law rule intervened, the statute did not extend the same provision to joint tenancies and tenancies in common of pure personalty. See Tyler and Palmer (eds.), *Crossley Vaines' Personal Property* (5th ed., 1973), at 56-57.

[206] *Business Corporations Act, 1982*, *supra*, note 110, s. 86(1).

[207] *Ibid.*, s. 53(1)(*b*)(ii).

[208] *Ibid.*, s. 86(1)(*b*).

[209] *Ibid.*, s. 87(1)(*b*) and (*d*).

It should be noted that these provisions in the Act do not protect the corporation if, after taking these precautions prior to registration, the information proffered turns out to be incorrect; that is, if it becomes apparent that a trustee was wrongfully removed, thereby negating the validity of the endorsements on the share certificates. In our example, if the corporation registered the shares in the names of A, B, and D, who now purport to transfer the shares to a purchaser, and if C has been wrongfully removed as trustee, C may challenge his removal and the purported disposition of the shares. He could then demand that the share register be rectified by placing A, B, and C as the registered owners. C would appear to have a good case since, unless the trust instrument otherwise provided, A and B, as a majority of trustees, could not bind the minority trustee, C, or the trust estate in the disposition of the shares to the purchaser.[212] The corporation, in this situation, might argue that the securities were "wrongfully taken" from C within the meaning of section 90 of the Act and that, as a consequence, unless the corporation had received notice of any adverse claim, C has lost his claim against the corporation for registering the transfer.[213] However, the application of this provision in this context is not clear, and, in the view of the Commission, the proposed protective provision in the revised Act should extend to this common form of trust property, in order to provide the conclusive assurance a corporation seeks. Indeed, we consider that this provision should apply to personal property of any description.

Another concern is that section 38 of the English legislation extends protection to a "purchaser" only. There are, however, other persons who, while not purchasers, must deal with trustees and the instruments by which they are appointed and discharged. The Director of Titles and land registrars under the *Land Titles Act*[214] and corporations maintaining share registers are obvious examples of persons who have to rely upon statements in instruments appointing or discharging trustees. In the view of the Commission, persons who have an obligation to register interests should be protected in the revised Act in the same manner as a purchaser.[215]

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[210] *Ibid.*, s. 87(3).

[211] *Ibid.*, s. 86(2).

[212] See *Luke v. South Kensington Hotel Co.* (1879), 11 Ch.D. 121 (C.A.), at 125, and *Nuspel v. Lem Foo*, [1949] O.W.N. 476 (H.C.J.). See, also, *Stuart v. Hamilton Jockey Club* (1910), 2 O.W.N. 673 (H.C.J.).

[213] *Business Corporations Act, 1982*, *supra*, note 110.

[214] R.S.O. 1980, c. 230, ss. 5 and 9.

[215] The Queensland Law Reform Commission also recommended this position, which was adopted by their trustee legislation: see *Report on the Law Relating to Trusts, Trustees, Settled Land and Charities*, *supra*, note 182, draft s. 13(3), and *Trusts Act 1973*, *supra*, note 172, s. 13(3).

A further deficiency is that section 38 does not cover all the circumstances that justify the appointment of a substitute trustee under section 36(1): it extends only to those circumstances whereby a trustee may be removed from office, but does not apply to the circumstances of death or retirement of a trustee. Moreover, even within the context of removal the section is not comprehensive, as it does not include infancy, which is a ground for the removal of a trustee under section 36(1) of the English Act. The view appears to have been taken that documentation to establish death, retirement, or infancy can be readily obtained. While this may be true, a purchaser must assure himself that the document proffered relates to the trustee who is being replaced, and documentation concerning death, retirement, or infancy may be in a form that is inadmissible in judicial proceedings concerning title. Further, section 38 has no application to a statement appointing or discharging a trustee based upon a circumstance contained in a trust instrument. In the opinion of the Commission, the proposed section of the revised Act that deals with the protection of a purchaser should be comprehensive in its coverage.

There also seems to be uncertainty about the scope of the protection contained in section 38(2) of the English Act. It is clear that, if a statement as to one of the circumstances authorizing the removal of a trustee is in fact false, section 38(2) will nevertheless deem the appointment of a new trustee "depending on that statement" to be valid in favour of a purchaser. In the absence of authority, it is, however, possible to suggest that the protection offered by subsection (2) may be even broader; that is, as long as the appointment of a new trustee depends upon a statement of circumstance contained in the statute, not only will the aspect of the appointment related to the circumstance be valid, but all other aspects of the appointment will be valid in favour of a purchaser. Under the first interpretation, if a purchaser sees an instrument of appointment of a new trustee, he may assume the validity of the appointment only in so far as the circumstances authorizing the appointment are concerned, and he will be at risk if other aspects of the appointment procedure were not properly exercised. The latter interpretation, however, would allow a purchaser, on seeing an instrument of appointment that contained a statement of circumstance authorizing the appointment, to rely upon the validity of the appointment in all respects.

However this may be, in our opinion purchasers would be reluctant, in all probability, to rely upon a non-judicial instrument of appointment or discharge if only certain aspects of the instrument could be relied upon conclusively while other aspects of the appointment procedure required verification by the purchaser. As a result, the utility of our proposed non-judicial appointment and discharge power would be lessened considerably. Appointment and discharge by the court would still be sought so that trustees could produce the court order to purchasers as conclusive evidence of their appointment. We have concluded, therefore, that the latter possible interpretation of the protection offered by section 38(2) of the English Act is preferable. Such an approach best achieves our objective of encouraging the use of the non-judicial appointment and discharge power. Finally, in our view, this approach should not be restricted to the appointment of a substitute trustee, but should be of general application.

Accordingly, we recommend that the revised Act should provide that, subject to our recommendation concerning the effect of actual notice, a deed of appointment or a deed of discharge of a trustee, whether pursuant to the Act or the trust instrument, should be conclusive evidence of the validity of the appointment or discharge in favour of a purchaser of trust property.[216] It should be noted that our recommendation, unlike section 38 of the English Act, discussed previously, places no restriction on the type of trust property included within the protection. Our proposed protection for purchasers applies to legal and equitable interests in land[217] and personal property of any description.[218]

In relation to the scope of the protection recommended above, a question arises concerning the effect of notice to a purchaser of any impropriety in the appointment or discharge of a trustee. Should such notice affect a transaction between a purchaser and an improperly appointed trustee and, if so, what type of notice should be sufficient? It could be contended that, as the intention of such a protective provision is to favour the safety of commercial dealings by protecting subsequent purchasers of trust property, even actual knowledge by the purchaser ought to be irrelevant. On the other hand, the interests of the trust beneficiaries would seem to demand that if a purchaser actually knows that any improper act or omission has occurred in an appointment or discharge, including the falsity of a statement contained in an appointment instrument, no protection should be provided that purchaser against claims of the beneficiaries. We have concluded, therefore, that actual notice should prevent a purchaser from relying upon the validity of an instrument of appointment or discharge. We are not of the same view with respect to constructive or implied notice, however, in view of the inherent problems attendant upon proof of such knowledge.

We are also of the view that the issue of actual notice of impropriety concerning the appointment and discharge of trustees should be examined in relation to persons who purchase trust property subsequent to the original purchaser. First, in order to protect subsequent innocent purchasers of the property in later transactions, we are of the view that an innocent party who purchases from a non-innocent purchaser should obtain good title to the property; that is, an innocent purchaser, whether he be an original or subsequent purchaser of the trust property, should not be concerned with the status of his predecessor in title. Secondly, we have concluded that, where an innocent purchaser subsequently transfers the property to a purchaser with actual notice of any impropriety, the latter should also take clear title; to provide otherwise would be to render, in practice, the property of the innocent purchaser inalienable. In other words, unless the title to the trust property is transferred to, or has been held by, a purchaser without actual notice of an improper act or omission in relation to the appointment or discharge of trustees, the property is held subject to the terms of the trust. However, in order to ensure that a trustee who has been improperly appointed cannot subsequently take the trust property in a later transaction, we are of the opinion that such a person should not be able to take valid title from a purchaser without actual notice of any impropriety. Finally, we have decided, on analogous reasoning, that protection should be afforded to a donee of property which, though originally trust property, has passed through the hands of a purchaser without actual notice of any impropriety.

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[216] Draft Bill, s. 27(1).

[217] See *supra*, this sec., and Draft Bill, s.27(1).

[218] *Ibid.*

Accordingly, we recommend that the revised *Trustee Act* should provide that a purchaser of trust property who at the time of the purchase has actual notice that an improper act or omission has occurred in the appointment or discharge of a trustee is not entitled to rely upon the validity of the deed of appointment or the deed of discharge unless title to the trust property has been held by a purchaser without actual notice of the improper act or omission.[219] However, a subsequent purchaser who purported to act as a trustee in the original transfer of any trust property and who had actual notice of the impropriety should not be able to take valid title from a purchaser without actual notice of any impropriety.[220] In addition, we recommend that a donee of property that was once trust property should be able to take valid title if the title to the property has been held by a purchaser without actual notice of any impropriety.[221]

Finally, in view of the Commission's earlier conclusion that the proposed protection for purchasers against improperly appointed trustees should apply to persons who have an obligation to register interests, we recommend that the revised Act should contain a provision to the effect that any official, including the Director of Titles, a land registrar, and any other person registering or certifying instruments or titles, who makes an entry in a book or other record in reliance upon an instrument of appointment or of discharge of a trustee or upon any vesting declaration, express or implied,[222] consequent upon an appointment or discharge of a trustee, should be afforded protection equivalent to the protection afforded a third party against improperly appointed trustees.[223] As discussed previously, this protection would not apply where the registering authority has actual notice that any improper act or omission has occurred in the appointment or discharge.[224] However, actual notice should not be deemed to be obtained by the abovementioned persons merely because the trust instrument or part thereof or a copy thereof is attached to or otherwise accompanies the deed of appointment or the deed of discharge, or because an express vesting declaration[225] is contained in the deed of appointment or discharge, and we so recommend.[226]

3. VESTING OF TRUST PROPERTY IN NEW TRUSTEES

While the mechanism for the non-judicial or judicial appointment or discharge of a trustee may be efficient and while a purchaser may have obtained evidence of the proper appointment or discharge of a trustee, either from production of the deed of appointment or discharge or the court order, he must also be assured that the trustees have been vested with the trust property. However proper their appointment, trustees cannot convey title to any asset that is still outstanding in the names of their predecessors.

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[219] *Ibid.*, s. 27(2).

[220] *Ibid.*, s. 27(3)(*b*).

[221] *Ibid.*, s. 27(3)(*a*).

[222] See *infra*, this ch., sec. 3.

[223] Draft Bill, s. 27(4).

[224] *Ibid.*, s. 27(2).

[225] See *infra*, this ch., sec. 3.

[226] Draft Bill, s. 27(5).

When a new trustee is appointed, either as the sole replacement for a former trustee, or as a substitute or an additional trustee who is joining an existing team of trustees who are continuing to act, it is obvious that the trustees have changed. The sole replacement trustee will need to have title to the trust property vested in his name; likewise, a new team of trustees, whether composed entirely or in part of new appointees, must also have title vested in the names of the new team. Similarly, if a trustee is discharged without the appointment of a new trustee, title must be vested in the names of the continuing trustees. A purchaser taking title from trustees must be able to determine quickly and easily that title to the trust assets has been vested in the trustees with whom he is dealing. We shall discuss first the situation where a change in the composition of the trustees occurs non-judicially, and the trust property is vested in the new trustees by means of either an express or implied vesting declaration. Secondly, we shall consider the position where trustees are appointed and discharged by the court, and the trust property is vested in the new trustees by a vesting order.

(a) NON-JUDICIAL VESTING DECLARATIONS

(i) Express Vesting Declarations

When the court appoints or discharges a trustee, an order vesting the property in the new trustees or team of trustees will be made, and this provides the assurance that a purchaser seeks.[227] If, on the other hand, the appointment or discharge of a trustee is effected non-judicially, a purchaser will wish a similar assurance that the new trustees have been vested with the trust property. Section 9 of the Ontario *Trustee Act* attempts to meet this problem, and provides as follows:

> 9.—(1) Where an instrument, executed after the 1st day of July, 1886, by which a new trustee is appointed to perform any trust, contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any personal estate so subject, shall vest in the person or persons who, by virtue of such instrument, shall become and be the trustee or trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in him, or in them as joint tenants, and for the purposes of the trust, that estate, interest or right.
>
> (2) Where such an instrument, by which a retiring trustee is discharged under this Act, contains such a declaration as is in this section mentioned by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate

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[227] *Trustee Act*, *supra*, note 3, ss. 10-13. See, also, *infra*, this ch., sec. 3(b).

to vest in the continuing trustees alone as joint tenants, and for the purposes of the trust, the estate, interest or right to which the declaration relates.

(3) This section does not extend to land conveyed by way of mortgage for securing money subject to the trust, or to any share, stock, annuity, or property transferable only in books kept by a company or other body, or in manner prescribed by or under an Act of the Parliament of Canada or of the Legislature.

(4) For the purpose of registration the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.

This section, adopted in Ontario in 1886,[228] and modelled on section 34 of the English *Conveyancing and Law of Property Act, 1881*,[229] deals with express vesting declarations. It provides that a declaration contained in an instrument of appointment or an instrument of discharge without appointment to the effect that the trust property, whether real or personal, vests in the new trustee or team of trustees, shall, without conveyance or assignment, operate to carry out the necessary vesting. Provisions based upon section 34 of the English *Conveyancing and Law of Property Act, 1881*, which now appears as section 40 of the English *Trustee Act, 1925*,[230] have been incorporated in the legislation of other Commonwealth jurisdictions.[231]

The purpose of an express vesting declaration is to place the new trustees in the same position they would have occupied had they received a conveyance, transfer, or assignment from the former trustees. In this way, difficulties of conveyancing or other modes of transfer, and of omissions, are overcome. We think that a provision of this kind serves a critical function, and that an improved form of express vesting declaration based upon section 9(1) of the present Act should be contained in the revised Act. Accordingly, we recommend that the revised Act should provide that a deed by which one or more substitute or additional trustees are appointed, or by which a trustee is discharged without another trustee being appointed, may contain an express declaration that the trust property vests in the one or more trustees who shall perform the trust as of the date of the instrument or such other date as is stated in the instrument for that purpose. Our Draft Bill so provides.[232]

The present section 9 of the Ontario *Trustee Act*, however, does suffer from a possible weakness. As drafted, it is open to the interpretation that each trust asset, in order to be the subject of an express declaration, must be listed *seriatim*. If this interpretation were to govern, the section would lose its potential power to convey to the new trustees assets that might be overlooked in the declaration. To guard against this eventuality, section 40(3) of the English *Trustee Act, 1925* provides that an express vesting declaration, whether created before or after 1925, should be deemed to vest in the new trustee or trustees "such estates, interests and rights as are capable of being and ought to be vested in those persons", notwithstanding the lack of an express reference in the instrument. We are of the opinion that a similar provision should be contained in the revised Act and, accordingly, recommend that, subject to certain qualifications dealt with below, an express vesting declaration should take effect as to all trust property, notwithstanding that any estate, interest, or right forming the whole or part of the trust property is not expressly referred to in the instrument.[233]

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[228] *The Conveyancing and Law of Property Act, 1886*, 49 Vict., c. 20, s. 17.

[229] *Supra*, note 8.

[230] *Supra*, note 5.

[231] Manitoba *Trustee Act*, *supra*, note 6, s. 15; *Trustee Act (Northern Ireland), 1958*, *supra*, note 30, s. 39; New Zealand *Trustee Act 1956*, *supra*, note 6, s. 56; Western Australia *Trustees Act, 1962*, *supra*, note 6, s. 10; New South Wales *Trustee Act, 1925*, *supra*, note 6, s. 9; and Victoria *Trustee Act 1958*, *supra*, note 162, s. 45.

[232] Draft Bill, s. 28(1).

(ii) Implied Vesting Declarations

It should be noted that section 9 of the Ontario *Trustee Act* applies only where a trust instrument "contains" an express vesting declaration. It follows, therefore, that if, through error or omission, a declaration does not appear in the instrument, there is no statutory conveyance of trust assets to the new trustees. Section 40 of the English Act makes provision for an implied vesting declaration to guard against errors or omissions that might cause an express declaration not to appear in the instrument. This section provides that, where an instrument of appointment or retirement without replacement does not contain a vesting declaration, it shall, subject to any express provision to the contrary therein contained, operate as if it had contained such a declaration extending to all the estates, interests, and rights with respect to which a declaration could have been made. A similar provision has been introduced into the Manitoba *Trustee Act* and a significant number of other Commonwealth Trustee Acts.[234]

The Commission is of the view that such an enabling provision would be useful and should be introduced in the revised Act. Accordingly, we recommend that where a deed by which one or more substitute or additional trustees are appointed, or by which a trustee is discharged without another trustee being appointed, does not contain an express vesting declaration, a declaration that the trust property vests in the one or more trustees who shall perform the trust should be implied as of the date of the instrument.[235] As with the express vesting declaration, the implied vesting declaration should – again subject to certain qualifications dealt with below – take effect as to all trust property.[236]

(iii) Matters Common to Both Express and Implied Vesting Declarations

We now turn to consider matters that are common to both express and implied vesting declarations.

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[233] *Ibid.*, s. 29(1)(*a*).

[234] *Supra*, note 231.

[235] Draft Bill, s. 28(2).

[236] *Ibid.*, s. 29(1)(*a*).

a. Effect of Vesting Declaration

A preliminary issue concerns the general effect of an express or implied statutory vesting declaration. The purpose of a vesting declaration is to place the new trustees in the same position as if they had received a conveyance, transfer, or assignment from the former trustees. The various Acts that have introduced the vesting declaration have assumed that the term is self-explanatory and have not attempted to specify how it is to operate. At present, section 9 of the Ontario *Trustee Act* provides, without further elaboration, that an express declaration "shall, without conveyance or assignment, operate to vest" the estate, interest, or right in the new trustees. Section 49 of the English *Trustee Act, 1925*, on the other hand, sets forth, in greater specificity, the effect of the vesting concept with respect to judicial vesting orders, and provides as follows:

> 49. A vesting order under any of the foregoing provisions shall in the case of a vesting order consequential on the appointment of a trustee, have the same effect –
>
> (*a*) as if the persons who before the appointment were the trustees, if any, had duly executed all proper conveyances of the land for such estate or interest as the court directs; or
>
> (*b*) if there is no such person, or no such person in full capacity, as if such person had existed and been of full capacity and had duly executed all proper conveyances of the land for such estate or interest as the court directs;
>
> and shall in every other case have the same effect as if the trustee or other person or description or class of persons to whose rights or supposed rights the said provisions respectively relate had been an ascertained and existing person of full capacity, and had executed a conveyance or release to the effect intended by the order.

We are of the view that, for greater clarity, it would be desirable to set forth in the revised Act a provision, modelled on section 49 of the English Act but expanded to cover all types of property, specifying the effect of an express or implied vesting declaration. The section should provide that the vesting declaration is a substitute for a properly executed or endorsed conveyance, transfer, or assignment that would otherwise have been appropriate and required to transfer the former trustees' title to the new trustees. Furthermore, consistent with our previous recommendation that an instrument of appointment or discharge of a trustee should be valid in favour of a purchaser,[237] we are of the opinion that any vesting declaration, whether expressed in the instrument, or, as recommended, otherwise implied therein, consequent upon any such appointment or discharge should be valid and conclusive evidence in favour of a purchaser, subject to actual notice to the contrary, that the trust property has vested in the new trustees.

Accordingly, we recommend that the revised Act should contain a provision to the effect that, subject to certain qualifications discussed below, a vesting declaration, express or implied, should take effect as if the estate, interest or right in the property had been actually conveyed or transferred by deed or otherwise to the one or more persons in whom the trust property is declared, expressly or impliedly, to be vested, or, in the case of a chose in action, as if it had been actually assigned to the last-mentioned person or persons.[238] As this provision would incorporate the principle of section 6(*d*) of the *Trustee Act* set out previously,[239] section 6(*d*) need not be carried over to the revised Act.

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[237] See *supra*, this ch., sec. 2.

In order to protect third parties concerned with the proper vesting of trust property in the trustees, we recommend that a vesting declaration, express or implied, consequent upon any appointment or discharge of a trustee, should be conclusive evidence of the validity of vesting of trust property in favour of a purchaser of trust property;[240] however, a purchaser of trust property who at the time of the purchase has actual notice that an improper act or omission has occurred in the vesting of the trust property should not be entitled to rely upon the validity of the vesting declaration unless title to the trust property has been held by a purchaser without actual notice of the improper act or omission.[241] In addition, we recommend that the proposals made previously in the context of the appointment and discharge of trustees concerning the protection that should be afforded to donees of trust property,[242] persons who have an obligation to register interests,[243] and subsequent purchasers who purported to act as trustees in the original transfer of trust property,[244] should apply with respect to the conclusive evidence of a vesting declaration, express or implied.[245]

There are several specific matters that require further clarification in the revised Act in relation to the operation of an express or implied vesting declaration, and it is to these that we now turn.

b. The Scope of the Declaration

There would appear to be some ambiguity concerning the scope of the term "vest" as this word appears both in section 9 of the Ontario *Trustee Act* and in section 40 of the English *Trustee Act, 1925*. As previously stated, the purpose of a vesting declaration seems to be to place new trustees in the position they would have occupied had they received a conveyance from the former trustees. It could be argued, however, that the statutes vest in the new trustees not only the title to assets held by the former trustees, but also titles outstanding in third parties to or in which the former trustees had a right or interest. Indeed, the statutory language has been held in Ontario to take a legal estate from a third party and place it in the new trustees, even where the former trustees had only an equitable right to call for the legal estate.[246]

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[238] Draft Bill, s. 29(1)(*b*). See, further, *infra*, this ch., sec. 3(a)(iii)c and d.

[239] See *supra*, this ch., sec. 1(h).

[240] Draft Bill, s. 29(2).

[241] *Ibid.*, s. 29(3).

[242] See *supra*, note 221 and accompanying text.

[243] See *supra*, notes 223-26 and accompanying text.

[244] See *supra*, note 220 and accompanying text.

[245] Draft Bill, s. 29(4).

A good case may be made for conferring upon the courts power to gather in such outstanding titles; a court can ensure that all the equities of the situation, and in particular the position of a third party, are taken into account. Nonetheless, as convenient as such a sweeping up may be for the new trustees and any subsequent purchaser or mortgagee, we are concerned that the position of a third party might be detrimentally affected if an automatic vesting of all outstanding titles followed from a non-judicial appointment or discharge of a trustee: for example, a third party might have a right of lien or charge over the property in question. To take title in the property from such a third party and vest it in the new trustees might unfairly prejudice the third party by depriving him of his security. We have decided, therefore, that an express or implied vesting declaration should vest in the new trustees only such rights, titles, and interests as the former trustees might have conveyed, transferred, or assigned. This would mean, for example, in the case of an outstanding legal title, that the new trustees would be vested not with the legal title itself, but with the equitable right that the former trustees had to call for the legal estate. Accordingly, we recommend that the revised Act should make it clear that a vesting declaration, express or implied, should convey, transfer, or assign to the new trustees the same estate or interest in the property as held by the former trustees.[247]

c. *Assignment of Choses in Action*

The meaning of the word "vest" as it appears in section 9(1) of the Ontario *Trustee Act* and section 40 of the English *Trustee Act, 1925* is also ambiguous with respect to both express and implied vesting declarations relating to choses in action. We preface our comments by a short statement on this area of the law.

Briefly stated, the assignment of a chose in action may be either legal or equitable. The legal assignment of either a legal or equitable chose in action is only permissible pursuant to statutory authority. In Ontario, section 53 of the *Conveyancing and Law of Property Act*[248] governs legal assignments and provides, as a constituent element of the assignment, that written notice must be given to the debtor; that is, if there is no notice there is no legal assignment, and the assignment will be at most equitable. An equitable assignment is valid without notice to the debtor and, as with legal assignments, both legal and equitable choses may be assigned in this manner. However, the consequences of failing to give notice in the case of an equitable assignment are twofold: first, a later assignee of the chose will have priority if he is the first to give notice; and secondly, the debtor may acquire further equities against the assignor and have them attach to the chose in action, until he receives notice of the assignment. In the case of a legal assignment, whether of a legal or an equitable chose, the assignee may sue the debtor without joining the assignor, and the same is true for the equitable assignee of an equitable chose. However, an equitable assignee of a legal chose has to join the assignor, and it must be remembered that a would-be legal assignment is at most equitable until written notice has been given to the debtor and there has been compliance with the other requirements of section 53 of the *Conveyancing and Law of Property Act*.

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[246] *Re Hunter and Patterson* (1892), 22 O.R. 571 (H.C.J.). See, also, Pettit, *supra*, note 80, at 254, *n*. 11.

[247] See Draft Bill, s. 29(1)(*b*).

[248] *Supra*, note 201.

It will be noted that section 9 of the Ontario *Trustee Act* applies to any "personal estate". These words are defined in the Act to include choses in action.[249] Accordingly, an express declaration in a trust instrument pursuant to the section would constitute an assignment of choses in action that are included in the trust assets. Two questions arise, however: first, does this mode of assignment, like an assignment under section 53 of the *Conveyancing and Law of Property Act*, enable the successor trustees to sue the debtor in their own names without joining the assignors, the former trustees; and, secondly, does this mode of assignment dispense with the need to give notice to the debtor?

Prior to the introduction into Ontario of the express vesting declaration, assignments of choses in action between former and successor trustees had to take the form of either a legal or equitable assignment,[250] and whether the assignor had to be joined and notice given to the debtor depended upon the form of assignment and the nature of the chose. In Ontario, the effect on this position of the introduction into the trustee legislation of an express vesting declaration cannot be stated with any certainty. In relation to a differently worded Trustee Act, and at a time when there was no legal, or statutory, assignment in New South Wales, the Australian High Court decided that the trustee assignees were enabled to sue without joining the assignor trustees.[251] But that decision clearly says nothing about whether a vesting declaration dispenses with the need to join the assignors where there is also a statutory legal assignment procedure in existence.

It will be recalled that we have recommended that the revised Act should contain provisions for an improved form of express vesting declaration, as well as introduce into Ontario the concept of the implied vesting declaration. As is apparent from the foregoing discussion, when new trustees are appointed or discharged under the revised Act, two types of statutory assignment procedure would be available with respect to any chose in action subject to the trust: first, an assignment effected by the express or implied vesting declaration of the revised Act; and secondly, an assignment pursuant to section 53 of the *Conveyancing and Law of Property Act*. Therefore, it is important to determine whether an assignment pursuant to the provisions of the revised Act relating to express or implied vesting declarations should have the same effect as an assignment pursuant to the *Conveyancing and Law of Property Act*.

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[249] *Trustee Act*, *supra*, note 3, s. 1(*j*).

[250] In England, prior to the introduction of the express vesting declaration in 1881, the only statutory provision relevant to this issue was contained in *Lord Cranworth's Act*, *supra*, note 7, s. 27, which merely required assignments to be carried out following private appointment. This presumably referred to the assignment procedures applicable for all assignments by any person. In Ontario, see, also, in this regard *An Act to provide for certain amendments of the Law*, *supra*, note 9, s. 30, subsequently incorporated into *An Act respecting Trustees and Executors and the Administration of Estates*, *supra*, note 44, s. 3.

[251] *Loxton v. Moir* (1914), 18 C.L.R. 360, at 373.

It would set aside all doubts and avoid confusion if the revised Act were to provide that the vesting declaration, whether express or implied, operates as an assignment in writing under the hand of the assignor within the meaning of section 53 of the *Conveyancing and Law of Property Act*.[252] As a consequence of such a provision, the successor trustees would be entitled to sue the debtor in their own names without joining the assignors, the former trustees. The incorporation of such a provision would necessitate, however, the giving of notice to the debtor of the vesting declaration as prescribed by section 53. We are of the view that this should be the case, as assignment materially affects the debtor's rights in relation to the assignors, and imposes upon him transferred debt obligations to the assignees, of whose existence he may only become aware when he has paid the assignors. From an abundance of caution, therefore, we are of the opinion that the notice requirement should be expressly stated in the revised Act.

Accordingly, we recommend that a provision should be included in the revised Act to the effect that where the estate, interest or right takes the form of a chose in action, a vesting declaration, express or implied, should be deemed an absolute assignment within the meaning of section 53 of the *Conveyancing and Law of Property Act*, and until express notice in writing is given by the newly vested persons to the debtor or other person obligated under the chose in action, the vesting declaration should have effect only as an assignment in equity from the formerly vested persons to the newly vested persons.[253]

d. Exceptions to Vesting Declarations

By section 9(3) of the Ontario *Trustee Act*, two types of trust asset are excluded from the operation of the express vesting declaration: first, land conveyed by way of mortgage for securing money subject to the trust; and secondly "any share, stock, annuity, or property transferable only in books kept by a company or other body, or in manner prescribed by or under an Act of the Parliament of Canada or of the Legislature". These two exceptions were adopted from the English legislation that introduced the express vesting declaration in 1881,[254] and their basis may be shortly stated. With respect to mortgages, where land was conveyed by way of mortgage to trustees, Parliament wished to recognize the practice among conveyancers of not mentioning the trust in the deed of conveyance, so that subsequent purchasers of the mortgage or of the land after a foreclosure or discharge of the mortgage, and their successors, would have no reason to investigate the trust document in order to verify the validity of the proffered title. Concerning stocks and shares, English company legislation permitted title to pass to new owners by one means only: namely, the recording of a change of ownership in the particular company's register after completion of an appropriate transfer document, a system not to be disturbed by the introduction of express vesting declarations. In 1925, a further exception was introduced into English trust law concerning leasehold land, an exception that was not carried over to the Ontario Act.[255]

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[252] Such a provision would also solve difficulties that could arise where a person nominated in the instrument appoints and expressly or impliedly makes a vesting declaration, whereby the choses in action, together with all trust assets, are taken from the outgoing trustees and vested in the new trustees. In these circumstances, who are the assignors?

[253] Draft Bill, s. 29(6).

[254] *Conveyancing and Law of Property Act, 1881*, *supra*, note 8, s. 34(3).

For reasons that will be mentioned, we leave discussion of the mortgage exception to the final section of this chapter. We turn at this point to discuss exceptions that relate to property transferred in a manner prescribed by legislation, including registration, and to leasehold land.

(1) Property Transferred in a Manner Prescribed by Legislation, Including Registration

As stated, section 9(3) of the Ontario *Trustee Act* expressly excludes from the statutory effect of an express vesting declaration "any share, stock, annuity, or property transferable only in books kept by a company or other body, or in manner prescribed by or under an Act of Parliament of Canada or of the Legislature".

The original purpose of this exception was to prevent the vesting declaration from interfering with any statutorily established system for the transfer of title to property. When this exception was adopted in Ontario in 1886,[256] the most notable trust property in this regard was corporate securities, the title to which could only be transferred by registration in the company's books.[257] Unlike the present English companies scheme,[258] the rule governing the passage of title has been changed in both the *Canada Business Corporations Act*[259] and the Ontario *Business Corporations Act, 1982*.[260] Under these

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[255] *Trustee Act, 1925*, *supra*, note 5, s.40(4)(*b*). Prior to 1925, the English Parliament excepted from the statutorily declared effect of the express vesting declaration any legal estate or interest in copyhold or customary land for the reason that manorial records were the basis of the title to these types of interest, and this system was not to be disturbed. In 1925, as the major land law reforms abolished these interests, reference to them was deleted from the trustee legislation.

[256] *The Conveyancing and Law of Property Act, 1886*, *supra*, note 228, s. 17(3).

[257] *The Ontario Joint Stock Companies' Letters Patent Act*, R.S.O. 1877, c. 150, s. 44.

[258] Under the present English companies scheme, there are at least two separate transactions required in a transfer of shares: first, a contract for the sale of the shares between the transferor and transferee and pursuant thereto the delivery to the buyer of the document of title and the share certificate; and secondly, the agreement between the transferee and the company to register the buyer on the books of the company in order for the transferee to become a member and shareholder and be recognized as such by the company. See, further, Gower, Cronin, Easson, and Wedderburn (eds.), *Gower's Principles of Modern Company Law* (4th ed., 1979), at 448-55.

[259] S.C. 1974-75-76, c. 33, s. 56. See, also, s.57(2).

[260] *Supra*, note 110, s. 69. See, also, s. 70(1)(*b*). However, under the Ontario *Corporations Act*, *supra*, note 110, s. 50, a transfer of shares is valid only after registration in the books of the company.

Acts, registration in the books of the corporation is no longer required to transfer title. It follows, therefore, that corporate securities are no longer interests "transferable only in books kept by a company" within the meaning of section 9(3) of the *Trustee Act*. However, the corporations Acts continue to specify the method by which title to securities is to pass; namely, the delivery of a duly endorsed share or bond certificate from the transferor to the transferee.[261] It would seem, therefore, that corporate securities are still probably excepted from the effect of a vesting declaration under section 9(3) of the *Trustee Act* as "property transferable . . . in manner prescribed by" legislation. The question that arises, therefore, is whether, in the revised Act, corporate securities should continue to be exempt from the operation of a vesting declaration. Indeed, this question applies equally to all property, the title to which passes by a statutory scheme that does not entail registration.

We are concerned about the fact that, if the exception contained in section 9(3) were retained, the whole system of express and implied vesting declarations might be reduced considerably in value, as by far the most significant type of modern trust property is corporate securities. On the other hand would repeal of the exception damage the integrity of the statutory schemes set up by the federal and provincial business corporations Acts? If the vesting declaration were itself to transfer title, then delivery of a duly endorsed share or bond certificate would not be the act that would cause the transfer as between the transferor and the transferee. The issuing corporation or the transfer agent would be required to register the transfer on the production of the discharge or appointment instrument, whether or not the new body of trustees had taken delivery of the share or bond certificate and produced it to the registering authority.

We have concluded that the transfer of title to securities by a vesting declaration would not undermine the present statutory scheme. Rather, the appointment or discharge instrument, either containing an express vesting declaration, or with a declaration implied therein, would merely be a substitute for the usual endorsements and physical delivery of share certificates. The registering authority would be able to rely upon the declaration, whether express or implied, as conclusive evidence that the trust property has vested in the new trustees. In these circumstances, the vesting declaration would not replace the requirement for registration in the books of the corporation. Registration would continue to be necessary for the transferee to claim the fruits of title as a security holder; namely, the right to notice, voting rights, the payment of dividends, and other benefits of shareholding and bondholding.[262] Indeed, in any case where registration is not required to transfer title, although it may be a supplemental requirement for the protection of title or for the beneficial enjoyment of title, we are of the view that the vesting declaration should effect the transfer of the property to the new trustees. Accordingly, we recommend that the exception in section 9(3) of the *Trustee Act* with respect to any property transferable in manner prescribed by legislation, but where registration is not required to transfer title, should not be carried over to the revised Act. Rather, title to such property should be transferred by the operation of our recommended express or implied vesting declaration.[263]

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[261] *Canada Business Corporations Act*, *supra*, note 239, ss. 62, 66(1), and 67, and *Business Corporations Act, 1982*, *supra*, note 110, ss. 73, 74, 78, and 79.

[262] *Business Corporations Act, 1982*, *supra*, note 110, s. 67(1).

It should be noted, in particular, that the effect of this recommendation would be to substitute an express or implied vesting declaration for the physical act of delivery, where delivery of some tangible thing, such as a duly endorsed share certificate or bar of gold, would be required to pass legal title. In this regard, two separate points should be considered. First, it is obvious that the new trustees should be placed in possession of the tangible thing where title has so vested; for example, certain registering authorities may require production of the tangible thing for inspection, cancellation, or endorsement. We are of the view that the revised Act should impose a duty upon both the former and the new trustees to ensure that the new trustees are put in possession of that thing, if it is within their power to do so. We are also of the opinion that if for some reason possession cannot be vested in the new trustees, the registering authority, when shown the instrument that constitutes the vesting declaration, should proceed to register the new trustees' interest on the same basis as if the tangible thing had been lost. Accordingly, we recommend that it should be the duty of both the formerly vested persons and the newly vested persons to ensure that the trust property is actually delivered to the newly vested persons, but where inspection, cancellation, or endorsement is required by any registering authority and the property cannot be produced, the newly vested persons should be able to apply for registration or recording in the same manner and subject to the same terms and conditions as if the property had been lost.[264]

The second point concerns the position of a third party in lawful possession of the tangible thing at the time a vesting declaration is made. We are of the view that no such third party should be prejudiced by the effect that we have recommended be afforded a vesting declaration. While the requirements of any registering authority with respect to the tangible thing should not be compromised, any rights of a third party in the tangible thing, or in property represented or evidenced by it, must also be protected. Accordingly, we recommend that where actual delivery of trust property has not taken place but transfer has occurred by operation of a vesting declaration, express or implied, no right of security or other personal interest of any person in that property should be destroyed by reason only of the operation of a vesting declaration.[265]

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[263] Draft Bill, s. 29(1). We acknowledge that an issue might be raised concerning the constitutionality of our proposed vesting declaration to effect a transfer of shares of a federally incorporated company to new trustees. However, in light of the Supreme Court of Canada's decision in *Canadian Indemnity Co. v. A.G.B.C.* (1976), 73 D.L.R. (3d) 111, where the Court held that provincial legislation could validly apply to federal companies as long as it does not impair their status and essential powers, we are of the view that our recommended vesting provisions, in so far as they are in relation to trusts, a matter within provincial jurisdiction, and in no way discriminate against or substantially impair the operation of any federally incorporated company, would be upheld as valid.

[264] Draft Bill, s. 29(7).

[265] Draft Bill, s. 29(8).

Our discussion to this point has related only to property the title to which is not transferable by registration. Where, by legislation, registration is essential for the acquisition of title, as in the case of property held under the *Land Titles Act*,[266] the issue arises whether property of this kind should be excluded entirely from the statutory effect of a vesting declaration, express or implied. We are of the opinion that a vesting declaration could have a useful, if limited, operation in these circumstances. A vesting declaration, while not transferring legal title, could operate as a substitute for the usual documentation necessary for registration purposes, and could, prior to registration, confer such rights upon the new trustees as they would have in equity. Accordingly, we recommend that, where an estate, interest or right in property can only be transferred by a registration or recording in a book or similar record, the vesting declaration, express or implied, prior to the registration or recording, should confer such rights upon the person so vested as he would have in equity, and it should be the duty of such person to apply for the required registration or recording.[267]

(2) *Leasehold Land and Covenants Against Assignment*

As will be recalled, in 1925 a further exception to the operation of a vesting declaration was introduced into the English *Trustee Act, 1925*.[268] This exception, contained in section 40(4)(*b*), provides that section 40, which is the section that makes provision for express and implied vesting declarations, does not extend to certain kinds of lease. The section provides as follows:

> 40.—(4) This section does not extend -
>
> . . . .
>
> (*b*) to land held under a lease which contains any covenant, condition or agreement against assignment or disposing of the land without licence or consent, unless, prior to the execution of the deed containing expressly or impliedly the vesting declaration, the requisite licence or consent has been obtained, or unless, by virtue of any statute or rule of law, the vesting declaration, express or implied, would not operate as a breach of covenant or give rise to a forfeiture;

It may be that the trust assets include a lease that contains a covenant not to assign without consent. The purpose of section 40(4)(*b*) is to avoid a vesting declaration operating as a statutory assignment of such a lease without the required consent, thereby exposing the lease to the possibility of forfeiture. Section 40(4)(*b*) of the English Act has no counterpart in the Ontario *Trustee Act* and, therefore, a lease containing a covenant against assignment is not excepted from the operation of section 9(1) of the Ontario Act.

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[266] *Supra*, note 214. This would also be the case for those corporations governed by the *Corporations Act*, *supra*, note 110, where, by s. 50, a transfer of shares is valid only after registration in the books of the company.

[267] Draft Bill, s. 29(5).

[268] *Supra*, note 5, s. 40(4)(*b*).

While it seems clear that an assignment by operation of law does not constitute a breach of a covenant against assignment,[269] we do not think that the application of this principle to an express – or, indeed, an implied – vesting declaration under the revised Act can be predicted with complete certainty. In the view of the Commission, this issue should be addressed expressly in the revised Act. There would appear to be two alternative approaches: first, as with the English Act, the revised Act could make an exception for leases that contain a covenant against assignment; or secondly, the revised Act could provide that a vesting declaration, express or implied, should extend to such leases, but that the vesting in the new trustees should not constitute a breach of covenant.

Under the law of Ontario, the right of a landlord to control an assignment of a lease depends on whether the premises are residential or non-residential. In the case of residential premises, there is a statutory right to assign under the *Landlord and Tenant Act*, and, although a tenancy agreement may provide that the right to assign is subject to the consent of the landlord, such consent may not be arbitrarily or unreasonably withheld.[270] Where the premises are non-residential, a covenant against assignment without consent is deemed, unless the lease contains an express provision to the contrary, to be subject to a proviso that such consent is not to be unreasonably withheld.[271]

In favour of the first alternative, it can be argued that the rights of a landlord should not be abrogated by an automatic assignment, which would occur if the leased premises were subject to a vesting declaration, express or implied. However, as a practical matter, it is not easy to see how an assignment resulting from a vesting declaration would be prejudicial to the interests of a landlord: such an assignment would probably not cause a change in the actual occupation of the leased premises, but rather in the management of the premises by a new team of trustees, a consequence that would not be as vital a concern to a landlord as an actual change of tenancy resulting from an ordinary assignment of a lease to a new tenant. It is true, however, that, unless there exists privity of contract between the landlord and the former trustees, the latter will not be liable for breaches that occur after the assignment. In turn, the new trustees would be entitled to be indemnified out of the trust fund for successful claims brought against them if they have acted properly.

After careful consideration, the Commission has concluded that leasehold property should not be excepted from the operation of a vesting declaration under the revised Act. However, in order to avoid the possibility that an assignment might constitute a breach of covenant, the revised Act should provide that no vesting declaration should operate as a breach of covenant not to assign; nor should such an assignment cause a forfeiture of a lease.[272] Accordingly, we recommend that, where leasehold property is subject to a trust, the vesting of the property in one or more substitute or additional trustees pursuant to a vesting declaration, express or implied, should not constitute a breach of any covenant or condition against assignment, subletting, or parting with possession of the property, whether absolute or with consent, made by one or more former trustees and, notwithstanding any term in the lease to the contrary, should not give rise to any forfeiture, right of re-entry, or other claim for breach of such covenant or condition.[273]

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[269] *Doe d. Goodbehere v. Bevan* (1815), 3 M. & S. 353, 105 E.R. 644.

[270] *Landlord and Tenant Act*, R.S.O. 1980, c. 232, s. 91. Although not as yet proclaimed, s. 16 of the *Residential Tenancies Act*, R.S.O. 1980, c. 452, is to the same effect.

[271] *Landlord and Tenant Act*, *supra*, note 270, s. 23.

(b) JUDICIAL VESTING ORDERS

In the previous sections of this chapter, we have discussed and recommended procedures for the retirement, removal, replacement, and appointment of trustees, either by non-judicial means or, where it appears to be in the best interest of the trust, by the court. We have noted that, where trustees are appointed or discharged non-judicially, third parties who deal with the new trustees must be assured that the appointment or discharge of the trustee or trustees was proper and that the present trustees have been vested with the trust property. Accordingly, we have made recommendations concerning the evidence required to verify the proper appointment or discharge of a trustee and the procedures for the vesting of trust property in the new trustees by means of either an express or implied vesting declaration.

Where trustees are appointed and discharged judicially it is similarly vital that third parties who deal with the new composition of trustees are assured of the proper appointment and discharge of the trustees and that the title to the trust assets is vested in the present trustees, so that the assets may be conveyed from the trustees to third parties. With respect to evidence of the proper appointment and discharge of trustees, the order of the court that removes and/or appoints the new trustees will be conclusive evidence that the trustees with whom a third party deals are properly appointed. As to the title to the trust assets, the court must also possess the means to vest the trust property in the new trustee or the new group of trustees. This is the function of the jurisdiction of the court to make vesting orders,[274] which we now turn to consider.

By order, the court, having appointed a new trustee, or removed or accepted the retirement of a trustee without making further appointment, vests the trust property in the new trustee or trustees. There may also be occasions where the court is asked to vest the trust property in a person who has not been appointed by the court, because, under an express or statutory power to appoint or discharge trustees, doubt may have existed whether title was transferred to the new trustee or trustees.

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[272] This was also the recommendation of the Queensland Law Reform Commission in its *Report on the Law Relating to Trusts, Trustees, Settled Land and Charities*, *supra*, note 182, draft s. 15(4)(b). Such a provision is contained in the Queensland *Trusts Act 1973*, *supra*, note 172, s. 15(6).

[273] Draft Bill, s. 29(9).

[274] For a full account of vesting orders, see *Lewin on Trusts*, *supra*, note 18, ch. 27; *Underhill's Law relating to Trusts and Trustees*, *supra*, note 38, at 638-48; and Waters, *supra*, note 94, at 761 and Appendix C.

The history of the judicial vesting order is, of course, older than that of the non-judicial vesting declaration. Under its inherent jurisdiction, the Court of Chancery had the power to vest title in trustees, and in the nineteenth century this authority was made statutory before Parliament moved on to the next step, which was to enable the parties to appoint and discharge trustees and vest trust property by their own act without the need to invoke the aid of the court.

Vesting orders are currently provided for in sections 10 to 16 of the Ontario *Trustee Act*. They have been in the Act for many years, amended only in small particulars from time to time, and they bear the familiar marks of their nineteenth century origin in English trustee legislation.[275] They not only deal with the vesting of realty and personalty in new trustees or new bodies of trustees, but they also enable the court to make vesting orders where for any reason one or more trustees cannot act, or where a trustee is refusing to act in accordance with his obligations. In addition, they empower the court to vest land in third parties where the would-be transferors cannot transfer the land because minors or unborn persons have interests in the land. The court is enabled to vest land or otherwise deal with land on behalf of minors and charitable bodies. In other words, the court has vesting authority to complement its powers to appoint trustees, pursuant to both the inherent jurisdiction and the *Trustee Act*,[276] and also to come to the parties' rescue where non-judicial powers of conveyance and vesting fail.

We have asked ourselves whether these sections of the *Trustee Act* should now be revised. Again, it is not our purpose to change anything that is working effectively, even if we might ourselves have chosen other language to express the same intent. The issue concerning vesting orders is whether the statutory jurisdiction is comprehensive of all those situations where the courts could be called upon to facilitate the sound administration of a trust, and whether, at present, vesting orders protect adequately the interests of third parties who acquire title from parties who themselves acquired title to the property by way of a vesting order.

(i) Present Law

The general power of the Supreme Court of Ontario to make vesting orders is to be found in the *Judicature Act*.[277] Section 79 of that Act enables the Court to vest real or personal property in any person, thus effecting a transfer of the title from another person in whom it has previously been vested. Section 79 of the *Judicature Act* provides as follows:

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[275] The origin of sections 10 to 16 of the present Ontario *Trustee Act* lies in *The Trustee Act, 1850*, *supra*, note 5, and *The Trustee Act, 1852*, *supra*, note 5. They were developed through later English Trustee Acts, and, when enacted as part of the *Trustee Act, 1893*, *supra*, note 41, they were introduced in Ontario in *The Trustee Relief Act*, R.S.O. 1897, c. 336, ss. 5 *et seq*.

[276] *Trustee Act*, *supra*, note 3, s. 5, provides for the appointment of trustees by the court. See *supra*, this ch., sec. 1(f), for a discussion, of judicial replacement, removal, and appointment of trustees.

[277] *Supra*, note 201. See, also, the Ontario *Courts of Justice Act, 1983*, Bill 100 (32d Leg. 3d Sess.), s. 112, which would take the place of s. 79 of the *Judicature Act*.

> 79. Where the court has authority to direct the sale of any real or personal property or to order the execution of a deed, conveyance, transfer or assignment of any real or personal property, the court may by order vest the property in such person and in such manner and for such estates as would be done by any such deed, conveyance, assignment or transfer if executed; and the order has the same effect as if the legal or other estate or interest in the property had been actually conveyed by deed or otherwise, for the same estate or interest, to the person in whom the property is so ordered to be vested or, in the case of a chose in action, as if it had been actually assigned to the last-mentioned person.

The section confers the power to vest property in two cases: first, where the Court has authority to direct a sale of property; and secondly, where the Court is authorized to order the execution of a deed or other appropriate mode of transfer of real or personal property. The section then provides for the effect of such a vesting order, namely, that it places the property as fully in the transferee's hands as if there had been a conveyance or transfer in the usual manner.

There are also two sections in the *Trustee Act* that give power to make vesting orders, and these provisions provide for circumstances outside the scope of section 79 of the *Judicature Act*. Sections 10 and 13 of the *Trustee Act* provide as follows:

> 10.—(1) In any of the following cases:
>
> (*a*) where the Supreme Court appoints or has appointed a new trustee; or
>
> (*b*) where a trustee entitled to or possessed of any land, or entitled to a contingent right therein, either solely or jointly with any other person is a minor, or is out of Ontario, or cannot be found; or
>
> (*c*) where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any land; or
>
> (*d*) where it is uncertain whether the last trustee known to have been entitled to or possessed of any land is living or dead; or
>
> (*e*) where there is no heir or personal representative of a trustee who was entitled to or possessed of land and has died intestate as to that land, or where it is uncertain who is the heir or personal representative or devisee of a trustee who was entitled to or possessed of land and is dead; or
>
> (*f*) where a trustee jointly or solely entitled to or possessed of any land, or entitled to a contingent right therein, has been required by or on behalf of a person entitled to require a conveyance of the land or a release of the right, to convey the land or to release the right, and has wilfully refused or neglected to convey the land or release the right for fourteen days after the date of the requirement,

the Supreme Court may make an order, vesting the land in any such person in any such manner, and for any such estate, as the court may direct, or releasing, or disposing of the contingent right to such person as the court may direct.

(2) Where the order is consequential on the appointment of a new trustee the land shall be vested for such estate as the court may direct in the persons who, on the appointment, are the trustees.

(3) Where the order relates to a trustee entitled jointly with another person, and such trustee is out of Ontario or cannot be found, the land or right shall be vested in such other person, either alone or with some other person.

13.—(1) In any of the following cases:

(*a*) where the Supreme Court appoints, or has appointed, a new trustee; or

(*b*) where a trustee entitled alone, or jointly with another person, to stock or to a chose in action,

(i) is a minor, or

(ii) is out of Ontario, or

(iii) cannot be found, or

(iv) neglects or refuses to transfer stock, or receive the dividends or income thereof, or to sue for or recover a chose in action, according to the direction of the person absolutely entitled thereto, for fourteen days next after a request in writing has been made to him by the person so entitled, or

(v) neglects or refuses to transfer stock, or receive the dividends or income thereof, or to sue for or recover a chose in action for fourteen days next after an order of the Supreme Court for that purpose has been served on him; or

(*c*) where it is uncertain whether a trustee entitled, alone or jointly with another person, to stock or to a chose in action is alive or dead,

the Supreme Court may make an order vesting the right to transfer, or call for a transfer of stock, or to receive the dividends or income thereof, or to sue for or recover a chose in action, in any such person as the court may appoint.

(2) Where the order is consequential on the appointment by the court of a new trustee, the right shall be vested in the persons who, on the appointment, are the trustees.

(3) Where the person whose right is dealt with by the order was entitled jointly with another person, the right shall be vested in that last-mentioned person either alone, or jointly with any other person whom the court may appoint.

(4) Where a vesting order may be made under this section the court may, if it is more convenient, appoint some proper person to make, or join in making, the transfer.

(5) The person in whom the right to transfer or call for the transfer of any stock is vested by an order of the court under this Act may transfer the stock to

himself, or any other person, according to the order, and all incorporated banks and all companies shall obey every order made under this section.

(6) After notice in writing of an order under this section, it is not lawful for any incorporated bank or any company to transfer any stock to which the order relates, or to pay any dividends thereon except in accordance with the order.

(7) The Supreme Court may make declarations and give directions concerning the manner in which the right to any stock or chose in action, vested under this Act, is to be exercised.

(8) The provisions of this Act as to vesting orders apply to shares in ships registered under the Acts relating to merchant shipping as if they were stock.

These sections of the *Trustee Act* particularize circumstances arising in the course of the administration of a trust where the Supreme Court of Ontario can usefully assist in the discharge of that administration. Both sections are concerned with three kinds of situation: first, where there is a change in the composition of the trustees; secondly, where circumstances exist that disable a trustee from acting or acting effectively; and thirdly, where a trustee is refusing to deal with the trust property as his duties require. Section 10 authorizes the court to make a vesting order where the trust property in question is land, and section 13 authorizes such orders where the trust property is stock, the right to receive dividends, or choses in action. The two sections are not otherwise identical, however, although one might expect this to be so. For instance, under section 10 a vesting order may be made where it is uncertain who is the survivor of two or more trustees,[278] while under section 13 there is no such jurisdiction. Again, under section 10 an order can be made where there is no personal representative of a sole trustee or it is uncertain who such person is,[279] but under section 13 the Court is given no such authority.

We now turn to consider three aspects of the power of the Court to make vesting orders pursuant to these statutory provisions: first, the types of trust property that should be comprehended by a statutory authority to make vesting orders; secondly, the circumstances in which vesting orders should be made; and thirdly, the persons in favour of whom vesting orders should be made.

(ii) Types of Trust Property Comprehended by Vesting Orders

The jurisdiction to make vesting orders concerning land, and also concerning stock and choses in action, is contained in separate sections in the *Trustee Act, 1925*,[280] in England. Although we can understand that, historically, these sections came into existence in England at different times, and that each in its time was drafted to take account of the particular property with which there was then concern, we can see no reason for the non-consolidation of these sections today. Accordingly, we are of the view that the amalgamation of sections 10 and 13 of the Ontario *Trustee Act* would be logical.

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[278] *Trustee Act*, *supra*, note 3, s. 10(1)(*c*).

[279] *Ibid*., s. 10(1)(*e*).

[280] *Supra*, note 5, s. 44 (land) and s. 51 (stock and choses in action).

We have noted that four of the Australian states have amalgamated the sections in their current trustee legislation, and have made the new section applicable to any property.[281] Manitoba[282] and Prince Edward Island[283] have also brought the sections together, but the trustee legislation of these provinces refers expressly to land, and to stock and choses in action, instead of to all property.

While there may be few trusts for which land, stock and choses in action is not an adequate description of the trust property, the revised *Trustee Act* should not be found inadequate if the trust property includes such items as jewellery, paintings, gold and silverware, musical instruments, or antique furniture. We therefore recommend that sections 10 and 13 of the present Ontario *Trustee Act* should be amalgamated, and that the new section should empower the court to make vesting orders in relation to any kind of trust property or interest in trust property.[284]

(iii) Circumstances in Which Vesting Orders May Be Made

We are also of the view, that, as in the Australian states we mentioned previously,[285] the revised *Trustee Act* should empower the court to make vesting orders in similar circumstances whatever the nature of the trust property. Not only are sections 10 and 13 of the present Ontario *Trustee Act* not identical as to the circumstances in which vesting orders may be made, but there are some obvious lacunae. The 1925 Act in England, and the subsequent Australian legislation, provide for these gaps arising from the nineteenth century language contained in Ontario's *Trustee Act*.

Generally speaking, vesting orders are required in three situations. First, where a change in the composition of the trustees has occurred, the trust property must be vested in the new trustee or trustees. Secondly, where there is uncertainty concerning the existence or identity of a trustee, or where a trustee is incapable of acting, or refuses to act, the property must be vested in the capable trustees or other persons. Thirdly, where a trustee is unable to act, but only for a temporary period of time, the property must be vested, temporarily, in the capable trustees or other persons. We turn now to discuss these three situations.

As to the first situation, sections 10(1)(*a*) and 13(1)(*a*) of the *Trustee Act* empower the Court to make a vesting order only where it has appointed a new trustee. However, a change in the composition of the trustees may occur not only where a trustee is appointed by the court, but also where an appointment is made under any express or statutory power.[286] We have recommended previously that vesting declarations should be implied in these circumstances if the declaration is not express,[287] and we are of the view that the court should be equipped to deal with any anomalous situations for which our recommendations concerning vesting declarations are found not to provide. Sections 10 and 13 of the present Act also fail to take into account the occasion where a trustee has retired or has been removed from the trust without a new trustee being appointed.[288] In our opinion, the revised Act should provide the court with authority to make vesting orders in these circumstances.

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[281] New South Wales *Trustee Act, 1925*, *supra*, note 6, s. 71; Victoria *Trustee Act 1958*, *supra*, note 162, s. 51; Queensland *Trusts Act 1973*, *supra*, note 172, s. 82; and Western Australia *Trustees Act, 1962*, *supra*, note 6, s. 78.

[282] *The Trustee Act*, *supra*, note 6, s. 16.

[283] *Trustee Act*, R.S.P.E.I. 1974, c. T-9, s. 4.

[284] Draft Bill, s. 58(1).

[285] *Supra*, note 281.

With respect to the second situation, that is, where there is uncertainty concerning the existence or identity of a trustee, or where the trustees are incapable of acting, or refuse to act, sections 10(1)(*b*) and 13(1)(*b*) of the present *Trustee Act* provide for judicial vesting orders where a trustee is a minor, or is out of Ontario, or cannot be found. Section 10(1)(*c*) also covers the situation where it is uncertain who is the survivor of two or more trustees jointly entitled to or possessed of any land, a provision not duplicated in section 13, or whether the last trustee known to have been entitled to or possessed of land is living or dead, which appears in section 13(1)(*c*) as well. The court is empowered under section 10(1)(*e*) to make a vesting order where there is no heir or personal representative or devisee of a deceased trustee, or it is uncertain who that person is, a power that is not found in section 13. Finally, the sections contemplate instances where a trustee is refusing to convey land[289] or transfer stock, to receive dividends or income, or to sue for or recover a chose in action fourteen days after a request or demand has been made of him by an entitled person or the court.[290]

Two approaches to reform are available to deal with the above-noted, and any other, circumstances in which vesting orders may be required. First, we could adopt a comprehensive list of the factual situations that may occur and that call for vesting. This was the approach adopted in 1962 and 1973 respectively by the Western Australia *Trustees Act, 1962* and the Queensland *Trusts Act 1973*.[291] Alternatively, we could remove the existing enumerations, and replace them with a provision conferring a general jurisdiction upon the court to make vesting orders with respect to any trust property in favour of such persons and on such terms as the court thinks fit with a view to the more efficient administration of the trust in question.

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[286] There is, at present, no jurisdiction in the court in these circumstances: see *In re Vicat* (1886), 33 Ch. D. 103 (C.A.), and *In re Dewhirst's Trusts* (1886), 33 Ch. D. 416 (C.A.), concerning earlier similar legislative language in England. The matter is referred to in *Lewin on Trusts*, *supra*, note 18, at 437, *n.* 4.

[287] See *supra*, this ch., sec. 3(a)(ii).

[288] Section 37 of the Ontario *Trustee Act*, *supra*, note 3, provides for the vesting of the deceased person's estate in the surviving personal representatives when one of their number is removed by the court, but the section is silent as to vesting when the court does replace, as well as remove, a personal representative. Although a personal representative is included within the statutory meaning of "trustee", the competence of the court to make a vesting order in these circumstances should be put beyond doubt.

[289] *Trustee Act*, *supra*, note 3, s.10(1)(*f*).

[290] *Ibid.*, s.13(1)(*b*)(iv) and (v).

[291] *Supra*, note 281.

It may be argued that the court should be able to discover from the revised *Trustee Act* precisely those circumstances in which the legislature intends that vesting orders should be available in lieu of the normal mode of transfer by means of the express or implied vesting declaration. In this way, vesting orders would be regarded as an exceptional mode of transfer. However, a legislative approach along these lines inevitably involves a listing of the circumstances in which vesting orders may be made, and in the Western Australia *Trustees Act, 1962*, for instance, no less than thirteen situations are listed. Nor is this by any means an exceptional Act. It reflects the general pattern of Australian vesting order sections that have been revised since 1924.

For our part, we prefer the second approach, namely, a general judicial authority to make vesting orders.[292] Since the object of this judicial jurisdiction is to enable the court to further the proper administration of trusts where the trustees or the beneficiaries cannot help themselves, we are not persuaded that the revised Act need list the circumstances in which the court may provide that assistance. As we have said, we consider that the powers of the court to appoint or remove trustees should be resorted to only where the non-judicial powers of appointment, removal, or retirement prove inadequate.[293] In the same way, vesting orders should be available where non-judicial conveyance or transfer by the parties is not possible, and the provisions of the revised *Trustee Act* concerning express and implied vesting declarations prove inadequate. We would therefore prefer to leave the choice of occasions for the making of vesting orders to the discretion and judgment of the courts. Accordingly, we recommend that, rather than provide a specific list of circumstances in which the court is empowered to make vesting orders, the revised *Trustee Act* should contain a provision to the effect that, where it appears to the court to be in the best interests of the trust, the court may vest the trust property or an interest therein in one or more persons in such manner, for such estate or interest and on such terms as the court orders.[294]

While our recommendation concerning vesting orders would confer a broad discretionary power upon the court, we wish to discuss one aspect of the present use of vesting orders that, in our view, should be discontinued.

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[292] A general jurisdiction of the type we have in mind, namely, "where property is vested in a trustee and it appears to the Court to be expedient to make a vesting order" appears as the fourteenth entry, as s. 78(*n*), in the Western Australia *Trustees Act, 1962*, *supra*, note 6. This subsection is an amalgamation of s. 44(vii) and s. 51(1)(v) of the English *Trustee Act, 1925*, *supra*, note 5.

[293] See *supra*, this ch., sec. 1(f).

[294] Draft Bill, s. 58(1). Another circumstance that we have not dealt with expressly, but where the court may be required to make a vesting order, is where trust property has been forfeited to the Crown either because the trustee has died intestate and with no next of kin, or because, with trust property undisposed of, a corporate trustee is in liquidation or is dissolved. Although it appears that this situation will rarely arise, it should be noted that our Draft Bill provides in s. 89 that the Crown should be bound by the revised Act, which would permit the court to exercise its powers to make vesting orders against the Crown if necessary.

In particular, those provisions of sections 10 and 13 that provide for vesting orders where a trustee is incapacitated, unascertained, or refuses to act appear to give the court the power to make a vesting order that would divest a trustee of trust property or an interest therein without removing him from office. Under the equivalent provision in section 44 of the English *Trustee Act, 1925*, it has been held that exactly this position can occur.[295] The Western Australia *Trustees Act, 1962* lists such trustee neglect or refusal as one of the enumerated thirteen situations in which the court may make a vesting order.[296] As we noted earlier, these statutory provisions of Commonwealth Trustee Acts have a long history, dating from the English *Trustee Act, 1850* and *The Trustee Act, 1852*.[297] Although they have mostly been employed to vest property in new trustees,[298] occasionally they have been used to give beneficiaries title where trustees have delayed in winding up a trust.[299]

As a general proposition, and subject to our later recommendations concerning the situation where a trustee is temporarily unavailable and it is not desired to remove him, we do not consider that the revised Act should encourage the courts to solve the problem of non-existent, unidentifiable, absent, incapable, or refusing trustees by vesting the trust property in one trustee, who can then convey it, while another apparently continues to act as trustee. Judicial vesting orders, like non-judicial vesting declarations, should go hand in hand with the appointment or recomposition of the body of trustees. If persons can be left holding the office of trustee, but not be vested with the trust property, vesting orders may create uncertainty for third parties dealing with trustees concerning who has the authority to deal with the trust property – the very difficulty that vesting orders are designed to avoid.

We are therefore of the view that problems of uncertainty concerning the existence or identity of a trustee should not be dealt with by vesting the trust property in known and identified persons, but by the removal of the problematic trustee, and the appointment of a new trustee, where necessary, which itself would be followed by the vesting of the trust property in the newly constituted trustees. To facilitate this, we have recommended previously that the revised *Trustee Act* should expressly authorize the court to remove trustees and to make substitutional or additional appointments of trustees "where there is no existing trustee or uncertainty as to the existence or identity of any trustee".[300] Similarly, where a trustee is incapable of acting or where he refuses to act, we are of the view that the trustee should be removed and the trust property vested in the capable and willing trustees. Our recommendations made previously concerning the power of the court to remove trustees would permit this to be done.[301] On the other hand, neglect aside, it is likely today that a trustee who refuses to act is in doubt concerning the entitlement of the claimant to receive the property he seeks. Such a trustee is not "wilfully refusing" within the meaning of the Act,[302] and, therefore, the appropriateness of a vesting order to deal with this situation would not arise.

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[295] See *In re Harrison's Settlement Trusts*, [1965] 1 W.L.R. 1492, [1965] 3 All E.R. 795 (Ch.D.), where the earlier authorities on this point are also discussed. In that case, the trustee sought to be displaced by a vesting order in favour of the three other trustees was a mental patient whose affairs were being administered on her behalf. Cross J. refused to make the order precisely because it would have left the mental patient still a trustee, and he was of the view that only exceptional circumstances justified this. See, also, *Underhill's Law relating to Trusts and Trustees*, *supra*, note 38, at 644, *n*. 4.

[296] *Trustees Act, 1962*, *supra*, note 6, s.78(2)(h). However, s. 78(2)(h) requires the neglect or refusal to have continued for 28 days, which is the period adopted by the English *Trustee Act, 1925*, *supra*, note 5, ss. 44(vi) and 51(1)(*d*) and (*e*), rather than the 14 days that the Ontario *Trustee Act* adopts.

[297] *Supra*, note 275.

[298] See, for example, *Re Cane's Trusts*, [1895] 1 I.R. 172, and *Re Ellis' Settlement* (1857), 24 Beav. 426, 53 E.R. 422.

[299] *In re Knox's Trusts*, [1895] 2 Ch. 483 (C.A.). In this case, the refusal was wholly unjustifiable.

Accordingly, we recommend that the authority contained in sections 10 and 13 of the present *Trustee Act* to vest trust property where there is uncertainty concerning the existence or identity of a trustee, or where a trustee is incapable of acting or refuses to act, should not be carried over to the revised *Trustee Act*. Rather, these matters should be dealt with by the court pursuant to its authority to remove and appoint substitute or additional trustees.

Where, however, the absence or incapacity of the trustee is only for a temporary period of time, we are of the view that different considerations should apply. We have attempted to emphasize in our proposed reforms our view that, generally speaking, where a trustee is unascertained, absent, incapacitated, or otherwise not available to act, a vesting order should be made only after the trustee has been removed and other persons, able and willing to act, have been constituted as the trustees. Vesting of the trust property would then take place in the names of those persons.

However, circumstances may arise where, notwithstanding the fact that a trustee is temporarily not available to act, one does not wish to remove him from office. Assume, for example, that one of the trustees is not available to act, or is under a disability, and he has not appointed the other trustees as his agent or given a power of attorney. Assume also that the trustees must act jointly, and not by majority, and the necessity arises for the trustees to act at once with regard to the trust property, for instance, because a market opportunity should be exploited. Under the general vesting power that we have proposed in lieu of a *seriatim* listing of permitted vesting situations, it would admittedly still be possible for the court to make a vesting order in favour of someone who is not a trustee, or in favour of those persons who constitute only a part of the body of trustees, but we are of the view that the use of the proposed general power in this manner should be discouraged.

Instead, we would make express provision for the emergency situation where a trustee is temporarily unable or unavailable to act. The statutory provision that we propose would confer jurisdiction upon the court to make a vesting order where there is a temporarily unavailable trustee, a desire not to remove him from office, and a need for the remaining trustees to deal with the trust property. The court's order would provide full vesting of the trust property in the remaining trustees as though they were all the trustees, so that a third party transferee would acquire an unchallengeable title. It would also be expressly provided that a dealing with the trust property by the remaining trustees, further to the order, would not constitute a breach of trust. Finally, the revised Act would authorize the court to make a further order vesting the trust property, if any remains, in the names of all the trustees when the unavailable or disabled trustee is again available to act.

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[300] See *supra*, this ch., sec. 1(f), and Draft Bill, s. 56(1)(*b*).

[301] See *supra*, this ch., sec. 1(f), and Draft Bill s. 56(1)(*a*).

[302] *In re Mills' Trusts* (1888), 40 Ch. D. 14 (C.A.). See, also, *Lewin on Trusts*, *supra*, note 18, at 437, *n*. 12.

Accordingly, we recommend that the revised Act should provide that, where a trustee is under a disability that temporarily precludes his participation in the administration of the trust, or where a trustee is, by reason of temporary absence, unable to participate in the administration of the trust, and it appears to the one or more other trustees that it would be desirable to proceed immediately to deal with the whole or a part of the trust property, and the circumstances, in the opinion of the court, do not justify the removal of the trustee who is under the disability or who is absent, the court may vest the whole or such part of the trust property in the trustee or trustees, other than the trustee who is under the disability or is absent, in such manner, for such estate or interest, and on such terms as the court orders.[303] We further recommend that, where an order has been made vesting trust property in the able and remaining trustees, persons acquiring any trust property vested in the remaining trustees by such order should acquire the title thereto that they would have acquired if the trustee under disability or absent had been *sui juris* and had executed and joined in the delivery to them of the conveyance, transfer, or assignment of the trust property, or had joined in the delivery to them of the trust property itself, as the case may be.[304]

In addition, we recommend that the revised Act should provide that a dealing with trust property vested temporarily in remaining trustees by a vesting order should not be a breach of trust merely because the trustee under disability or absent did not join or concur in the dealing.[305] Finally, we recommend that, on the cessation of the disability or absence of a trustee, the court should be able to make an order revesting the trust property, or such of it as remains subject to the trust, and any property received in exchange for it, in all of the trustees.[306]

(v) Persons in Favour of Whom Vesting Orders May Be Made

In every Commonwealth common law jurisdiction, it is usual for the trustee legislation to enable the court to vest the trust property in any person the court thinks fit,[307] and sections 10 and 13 of the Ontario *Trustee Act* are no exception, although differing language is employed in each section. Vesting orders are normally used to vest trust property on a change of the trustee or trustees, or of the composition of the body of trustees. Existing trustees, if any, are divested, and title is then vested in the new trustee or body of trustees.

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[303] Draft Bill, s. 59(1).

[304] *Ibid.*, s. 59(2).

[305] *Ibid.*, s. 59(3).

[306] *Ibid.*, s. 59(4).

[307] *See supra*, note 281.

Generally speaking, we are of the view that a separation of those persons who are trustees and those who are vested with title to trust property is undesirable. However, circumstances may arise where the court may find it a more effective or direct procedure to vest the trust property in question in a person other than the trustees, such as a trust beneficiary[308] or a third party purchaser.[309] This would seem to happen rarely, but, realizing the value of the court's jurisdiction being wide with respect to vesting orders, we are of the opinion that it would be useful to retain this feature in the revised Act. We have also observed that the four Australian states that have amended and updated the power with respect to vesting orders permit the court to vest the trust property in persons other than the trustees.[310] The general vesting provision that we have recommended for inclusion in the revised *Trustee Act* would enable the court to continue to make orders vesting trust property in such persons as it thinks fit.[311]

We would, however, retain one restriction on the power of the court to vest trust property in any person. This restriction is contained at present in sections 10(3) and 13(2) of the *Trustee Act*, and applies where there is a change in the composition of the trustees either because of the removal or retirement of a trustee from office or the appointment of a new trustee. We are of the view, and recommend, that where a vesting order is consequential on the appointment of one or more new trustees, or on the retirement or removal of a trustee without the appointment of a new trustee in place of the trustee retiring or removed, the court should vest the trust property in the person or persons who, on the appointment, retirement, or removal, are the trustees.[312]

(v) Effect of Vesting Orders

It is essential that a vesting order transfer property as effectively as if the appropriate mode of transfer had been carried out. We are dealing here with a problem that we earlier considered in connection with vesting declarations.

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[308] See *In re Grayson*, [1879] W.N. 52 (Ch. D.). In this case, a life tenant was vested with title where he had become entitled to the fee simple remainder and the trustees refused to concur in a sale of the property.

[309] See *In re New Zealand Trust and Loan Co.*, [1893] 1 Ch. 403 (C.A.), explained in *In re Gregson*, [1893] 3 Ch. 233 (C.A.), where a third party had acquired shares by way of an order vesting in trustees the right to call for a transfer of the shares into the third party purchasers' names. The reason for such a vesting order was that the trustees themselves did not wish to become the registered owners; the shares were subject to a call. But see *In re Deans*, [1954] 1 W.L.R. 332 (Ch. D.), where the *Trustee Act, 1925*, *supra*, note 5, s. 51(1), was held not to apply.

[310] *Supra*, note 281.

[311] Draft Bill, s. 58(1).

[312] Draft Bill, s. 58(2).

In relation to the vesting order, we have considered section 79 of the *Judicature Act*, the text of which we set out previously.[313]

After close examination of the alternatives, and in particular the possibility of introducing in the revised Act a number of provisions setting out the effect of vesting orders in a series of situations, we have concluded not only that the language of section 79 of the *Judicature Act* continues to be effective and adequate for the purposes of vesting orders, but also that it should apply to all vesting orders under the revised *Trustee Act*. In our view, a provision akin to section 79 should be contained in the revised Act. Accordingly, we recommend that the revised *Trustee Act* should contain a provision to the effect that a vesting order under the Act has the same effect as if the legal or other estate or interest in the property had been actually conveyed by deed or otherwise for the same estate or interest to the person in whom the property is ordered to be vested or, in the case of a chose in action, as if it had been actually assigned to the last-mentioned person.[314]

It will also be recalled that, in relation to the effect of a vesting declaration, we recommended that any vesting declaration, whether express or implied, consequent upon the appointment or discharge of a trustee should be valid and conclusive evidence in favour of a purchaser, subject to actual notice to the contrary, that the trust property has vested in the new trustees.[315] In the context of the appointment and discharge of trustees and the vesting of trust property by the court, we would merely state the obvious – that the judicial vesting order is sufficient and conclusive evidence in favour of third parties that the trust property is properly vested in the trustees. We would also note that section 142 of the *Judicature Act* provides that any order of the court made under any statute effectually protects and indemnifies any person acting thereon in good faith. Accordingly, any third party relying upon a vesting order made by the court pursuant to the revised *Trustee Act* would be protected.

We wish to note one proposed provision, recommended in relation to non-judicial vesting declarations, that we think should be applicable in the context of vesting orders. Specifically, it should be provided that any vesting of trust property in new trustees further to a vesting order does not constitute a breach of any covenant in a lease held by the trust, or of any condition against assignment, subletting or parting with possession of the property. The reasoning for such a provision was discussed previously,[316] and is equally applicable to the vesting of trust property by the court. Accordingly, we recommend that, where leasehold property is subject to a trust, the vesting of the property in one or more new trustees pursuant to a vesting order should not constitute a breach of any convenant or condition against assignment, subletting or parting with possession of the property, whether absolute or with consent, made by one or more former trustees and, notwithstanding any term in the lease to the contrary, should not give rise to any forfeiture, right of re-entry or other claim for breach of such covenant or condition.[317]

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[313] *Supra*, this ch. sec., 3(b)(i).

[314] Draft Bill, s. 60.

[315] See *supra*, this ch., sec. 3(a)(iii), and Draft Bill, s. 29(2).

[316] See *supra*, this ch., sec. 3(a)(iii)(d)(2).

(vi) Appointment of Persons to Convey in Lieu of a Vesting Order

Section 13(4) of the Ontario *Trustee Act* enables the court, if it is thought more convenient, to appoint a person to transfer, or to join in transferring, the stock or chose in action in question, rather than vesting the property in that person for the purpose. In effect, deeds of conveyance or other appropriate means of transfer are employed in the usual manner, and no vesting order is made. Strangely enough, no similar jurisdiction to appoint a person to convey, rather than vesting the property, is conferred upon the court by section 10 of the Act, which authorizes vesting orders in relation to land.

The English trustee legislation,[318] the Australian and New Zealand legislation,[319] and other contemporary Acts of the Commonwealth, each contain a general power to appoint a person to convey in lieu of a vesting order authorized by the legislation concerned. There can be little doubt that the court in Ontario today should have the benefit of such a general power. Accordingly, we recommend that section 13(4) of the present Act should be carried over, in an expanded form, to the revised *Trustee Act*. The revised Act should state that, where the revised Act provides for the making of a vesting order, the court may, in lieu thereof, appoint a person to make or to join in making the transfer of the trust property.[320]

(vii) Special Classes of Vesting Order

At present, the Ontario *Trustee Act* contains three sections that provide for vesting orders in special circumstances. The first of these provisions is section 11, which states as follows:

> 11. Where any land is subject to a contingent right in an unborn person, or a class of unborn persons, who, on coming into existence, would, in respect thereof, become entitled to or possessed of the land on any trust, the Supreme Court may make an order releasing the land from the contingent right, or may make an order vesting in any person the estate to or of which the unborn person, or class of unborn persons, would, on coming into existence, be entitled or possessed in the land.

Section 11, like section 45 of the English Act, is concerned with the contingent rights of unborn persons in land "who, on coming into existence, would, in respect thereof, become entitled to or possessed of the land on any trust". In particular, the purpose of the section is to facilitate dealing with land where contingent rights of unborn persons in that land would make it impossible for purchasers to get a conveyance from living persons of the whole interest, including that of the unborn. The court is authorized, by order, to release those rights, or to vest them in others on behalf of the unborn. However, the Ontario *Trustee Act* does not contain a provision equivalent to section 47 of the English Act, which, in effect, deems all persons having an interest in the land, including the unborn, to be trustees for the purposes of the Act, in order that a vesting order giving clear title may be made as to any land in which there is any interest or contingent right belonging to such persons.

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[317] Draft Bill, s. 62.

[318] *Trustee Act, 1925*, *supra*, note 5, s. 50. This statutory authority also has a nineteenth century origin.

[319] *Supra*, note 281.

[320] Draft Bill, s. 58(3).

These sections have their origin in the English Trustee Acts of 1850 and 1852,[321] and have been retained and broadened in subsequent revisions of the Trustee Act in England. The technique of declaring persons, including unborn persons, who have an interest in land directed by a court to be conveyed, to be trustees, or to be persons who on coming into existence would be trustees, is continued, as we have said, in section 47 of the English *Trustee Act, 1925*. This technique was also introduced into Ontario legislation in 1897 by *The Trustee Relief Act*,[322] but disappeared in the 1926 statutory revision. As a result, section 11 of the present Ontario Act is deprived of its explanatory underpinnings.

In the absence of its former statutory context, the utility and purpose of section 11 are not readily apparent, and it is difficult to see much value in section 11 today. Although the language of the section applies whenever interests of the unborn are held on trust,[323] the section was originated to deal with the problem of the legal future interest of the unborn. Today, most if not all, contingent interests will be equitable interests behind a trust, and the problem therefore disappears, because the trustees will be able to overreach such interests in the exercise of their powers of sale and transfer.

It is also worthy of note that any land in which an unborn person holds a contingent interest would inevitably be a "settlement" within the meaning of the *Settled Estates Act*, and the court would have the power under that Act to authorize a sale of the whole or any part of the settled estate.[324] We shall recommend in a subsequent chapter of this Report the repeal of that part of the *Settled Estates Act* that deals with settled land held on trust, and that the powers of administration over such land should be contained in the revised *Trustee Act* and exercisable by the trustees.[325] However, because it remains possible to create successive legal interests in Ontario without the imposition of a trust, we also recommend that, insofar as the *Settled Estates Act* deals with this type of interest, that Act should remain in force. Accordingly, there would appear to be little need for section 11 of the *Trustee Act*, given the jurisdiction of the court to deal with successive contingent legal interests of unborn persons under the *Settled Estates Act*. Nonetheless, as with that aspect of the *Settled Estates Act* that we recommend should remain in force, we are of the view that, pending a review of this area of the law in the context of a general study of land law, section 11 of the *Trustee Act* should be retained.

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[321] *Supra*, note 275.

[322] *Supra*, note 275, ss. 11 and 12.

[323] The section expressly applies to unborn persons "who . . . would . . . become entitled to or possessed of that interest *on any trust*". Originally, the section was intended to mean a deemed trust for the purposes of the statute. See the English *Trustee Act, 1850*, *supra*, note 5, ss. 29 and 30.

[324] *Settled Estates Act*, R.S.O. 1980, c. 468, s. 13(1)(*b*).

[325] See *infra*, ch. 4, sec. 3(c).

The connection of section 11 with the law of trusts is, however, remote. The provisions of section 11 are more naturally associated with, and might be expected to be found in, either the *Children's Law Reform Act*[326] or the *Conveyancing and Law of Property Act*.[327] We have concluded that it should be relocated in the latter Act; it essentially ensures that conveyances of land can be made with clear title.

In transferring section 11 to the *Conveyancing and Law of Property Act*, we are of the view that the meaning of the words "entitled to or possessed of the land" should be clarified so that all conditions precedent are provided for. We would also broaden the usual meaning of "unborn persons" to include other classes whose identity has not yet been ascertained. Finally, we would insert a subsection stating specifically that, where the right of any unborn person is an equitable interest, an application to the court to release or otherwise deal with such an interest shall take the form of an "arrangement", approval for which must be sought under the terms of the *Variation of Trusts Act*.[328] It would there be expressly stated that the section of the revised *Conveyancing and Law of Property Act* now proposed shall not otherwise apply to such an interest. Accordingly, we recommend that section 11 of the present *Trustee Act* should be retained, but placed in the *Conveyancing and Law of Property Act* with the above-noted amendments.

The second provision of the *Trustee Act* that deals with specialized vesting orders is section 12, which provides as follows:

> 12. Where any person entitled to or possessed of land, or entitled to any contingent right in land, by way of security for money, is an infant, the Supreme Court may make an order vesting or releasing or disposing of the land or right in like manner as in the case of a minor trustee.

Section 12 has a similar history to that of section 11. Like its counterpart in the English *Trustee Act, 1925*, section 46, section 12 utilizes the same technique as section 11 in order that land that is subject to a court order for sale or mortgaging may be transferred to the purchaser or mortgagee free of the interests of others; namely, that the minor mortgagee is deemed a trustee so that the mortgaged land can be vested in another person free of the mortgage. Although the purpose of section 12 of the present *Trustee Act* continues to be of value, it is also to be found in the *Trustee Act* solely because of the deemed trust. We would associate this provision with the

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[326] R.S.O. 1980, c. 68, as am. by the *Children's Law Reform Amendment Act, 1982*, S.O. 1982, c. 20.

[327] *Supra*, note 201.

[328] R.S.O. 1980, c. 519. See *infra*, ch. 7, concerning the Commission's recommendations on the *Variation of Trusts Act*.

Children's Law Reform Act, where we would expect a practitioner to look for it.

We would, however, amend the section so as to provide expressly that the court should have jurisdiction to order the minor, or another person named by the court, to execute a discharge or assignment of the mortgage. Where the court has ordered the minor, or another person, to execute the relevant documents, section 60(7) of the *Children's Law Reform Act* (which was added by the *Children's Law Reform Amendment Act, 1982*[329]), to the effect that "[e]very document executed [by the minor] is as effectual as if the child by whom it was executed was eighteen years of age or, if executed by another person in accordance with the order, as if the child had executed it and had been eighteen years of age at the time", should apply in these circumstances as well. Accordingly, we recommend that section 12 of the present *Trustee Act* should be retained, and should appear in the *Children's Law Reform Act*, subject to the above-noted amendments.

The final special class of vesting orders that we would mention deals with the vesting of property in trustees of any charity or society over which the court has jurisdiction. This matter is provided for, at present, by section 14 of the Ontario *Trustee Act*, the counterpart of which is section 52 of the English *Trustee Act, 1925*.[330] Section 14 of the Ontario Act provides as follows:

> 14. The Supreme Court may exercise the powers herein conferred for the purpose of vesting any land or personal estate in the trustee of any charity or society over which the court would have jurisdiction upon action duly instituted.

Provisions are made in the *Religious Organizations' Lands Act*, for example, for the vesting of land in successor trustees of a religious organization, which must be charitable according to the law of Ontario.[331] Nonetheless, apart from religious organizations, a charitable trust may exist where there is no one who is able to accept title to property donated to the charity, or who has the necessary authority to sell assets belonging to the charity.[332] Accordingly, the court should possess a general power to vest property in trustees of any charity, and we would retain section 14 in the revised Act for this purpose. We therefore recommend that, for the purpose of vesting any property in the trustees of any charity, the court should be empowered to exercise any of the powers recommended previously for the making of vesting orders.[333]

4. THE EXERCISE OF POWER BY TRUSTEES

Even if we assume that the revised Act will facilitate the appointment and discharge of trustees, and provide evidence of both the proper appointment and discharge of trustees and the vesting of the trust property in the new trustees, either by means of production of the deed of appointment or discharge or a court order, a purchaser will nevertheless need to be assured that the trustees, whether appointed judicially or non-judicially, have the particular power that they purport to exercise and that they are properly acting within the scope of that power. This issue raises several difficulties.

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[329] *Supra*, note 326, s. 8.

[330] *Supra*, note 5.

[331] R.S.O. 1980, c. 448, ss. 3(5) and (6), and 1(*b*)(i).

[332] Waters, *supra*, note 94, at 761.

[333] Draft Bill, s. 78.

At present, a purchaser may deal with persons who are properly appointed trustees and vested with the trust property. Nonetheless, if the purchaser has actual, constructive, or imputed notice that the parties are trustees, rather than owners in their own right, he is obliged to satisfy himself that the trustees have the power to act and that they are acting within the scope of that power in order to avoid the consequences of an *ultra vires* act by trustees.[334] A purchaser is expected to protect himself to this extent, and the risk of loss in these circumstances is allocated to the purchaser rather than to the beneficiaries.[335] However, if trustees, acting within the scope of their powers, convey property to a purchaser for a fraudulent purpose of their own and receive purchase money, the purchaser is secure in all respects if, having given value, he neither knew nor reasonably could have known of the trustees' fraudulent intent. Should the trustees prove unable to compensate the trust for any loss incurred by their fraudulent act, it will be the trust beneficiaries who suffer the loss.[336] At this point, the policy of existing case law is to prefer the interests of a purchaser for value acting without actual or constructive notice of the trustees' intended wrongdoing to those of the beneficiaries. In other words, the law prefers to support commercial dealings in the ordinary and, so far as the purchaser is concerned, honest course of business. Indeed, equity's introduction of the concept of the *bona fide* purchaser for value without notice, and its rejection of the common law doctrine of *nemo dat quod non habet*, was intended to facilitate the ordinary and honest course of business, even though this caused loss to the beneficiaries.

If the instrument by which trustees are non-judicially appointed and vested with trust property, or the court order that appoints or discharges and vests property in the trustees, were viewed as giving notice of the trust to a purchaser, the purchaser would have no alternative but to investigate the terms of the trust in order to ensure that the trustees were acting within their powers. This is certainly a laborious and often hazardous task for a purchaser; his construction of the trust instrument may later prove to have been incorrect. Various approaches have been taken to the solution of this problem. For example, certain American jurisdictions declare that trustees, properly appointed and vested with title to trust property, shall be deemed to be acting properly in furtherance of their powers so far as a third party who enters into a contract with the trustees is concerned.[337] Actual notice alone deprives the third party of this protection. The Ontario *Trustee Act*, however, like legislation in other jurisdictions that have followed the English Trustee Act tradition, is silent on this issue.

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[334] See Waters, *supra*, note 94, at 880-97.

[335] *Underhill's Law relating to Trusts and Trustees*, *supra*, note 38, at 762 *et seq*.

[336] If the tracing of the trust property by beneficiaries is in equity (which will most likely be the case, as their title under an express trust is purely equitable, and common law does not recognize or enforce equitable rights), they cannot claim the property from a *bona fide* purchaser for value: see *Harrison v. Mathieson* (1916), 36 O.L.R. 347, 30 D.L.R. 150 (App. Div.). If, however, a legal remedy is available to the beneficiaries for the recovery of the trust property (which may be the case if the trust is imposed by operation of law), a *bona fide* purchaser for value will not gain title unless he comes within an exception to the rule of *nemo dat quod non habet*. In either case, if a purchaser for value knew of the true facts surrounding the disposition of the trust property, the property would be subject to recovery: see *Chandler & Massey Ltd. v. Irish* (1911), 24 O.L.R. 513, aff'd (1911), 25 O.L.R. 211 (Div. Ct.), aff'd (1913), 29 O.L.R. 112, 13 D.L.R. 829 (App. Div.). See, generally, Waters, *supra*, note 94, at 880-97.

Generally, the English property law reformers of 1925 wished to ensure that a purchaser dealing for value with trustees was afforded the same protection when a non-judicial change of trustees occurred as when there had been a judicial appointment of trustees and a court order vesting trust property in the new team of trustees. A purchaser, therefore, was granted the right to rely upon the non-judicial instrument of appointment as a valid appointment.[338] In the absence of an express vesting declaration, a purchaser was also granted the right to rely upon the validity of a vesting declaration implied in the non-judicial instrument of appointment.[339] As a general principle, the reformers did not intend to go beyond this point. That is to say, if a purchaser had actual, constructive, or imputed notice of the trust, he would continue, as before the 1925 reforms, to proceed at his peril if he did not assure himself that the trustees had the power they were purporting to exercise and that they were acting within the scope of that power. It is evident that a court order,[340] or a non-judicial instrument appointing trustees and vesting trust property, might have the effect of giving notice to a purchaser that trustees were involved with the property in question. But having equated the effect of a judicial and non-judicial change of trustees, the reformers decided to leave the matter there.

However, in one specific instance, the 1925 English legislation did address this problem. As previously stated, in 1881, Parliament at Westminster expressly omitted from the statutorily declared effect of an express vesting declaration, among other types of property, land conveyed to trustees by way of mortgage to secure money loaned by the trust.[341] This exception resulted from the practice among conveyancers of not mentioning any trust in the conveyance of land as mortgage security, so that subsequent purchasers of the mortgage, or of the land after a foreclosure or discharge of the mortgage, and their successors, would not have to investigate the trust document in order to verify the validity of the proffered title, or the powers of the trustees to give receipts for purchase moneys.

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[337] Uniform Trustees' Powers Act, National Conference of Commissioners on Uniform State Laws (73d Annual Conference, 1964), Uniform Laws Ann. (1978), Vol. 7A, at 761, and Cum. Supp. 1982, at 365, §7 (hereinafter referred to as "American Uniform Act"). The Uniform Act was approved by the National Conference of Commissioners on Uniform State Laws, together with the American Bar Association, in 1964, and has been adopted to date by eleven states: namely, Florida (1974), Idaho (1965), Kansas (1968), Kentucky (1976), Maine (1979), Mississippi (1966), Montana (1974), New Hampshire (1969), Oregon (1977), Utah (1975), and Wyoming (1965).

[338] *Trustee Act, 1925*, *supra*, note 5, s. 38.

[339] *Ibid.*, ss. 40(1)(*b*) and 40(2)(*b*).

[340] As to a court vesting order giving notice of the trust to subsequent purchasers dealing with the trustees, s. 142 of the *Judicature Act*, *supra*, note 201, would not appear to give protection against such notice. This is consistent with the position in England: see *Lewin on Trusts*, *supra*, note 18, ch. 27.

[341] *Conveyancing and Law of Property Act, 1881*, *supra*, note 8, s. 34. See, now, *Trustee Act, 1925*, *supra*, note 5, s. 40(4)(*a*). See, also, *supra*, this ch., sec. 3(a)(iii).

During the latter decades of the nineteenth century, however, and continuing until 1925, conveyancers in England had great difficulty in keeping the trust deed off title, should a change of trustees occur. Methods of concealing the trust were condoned by the courts, but should any purchaser of formerly mortgaged land receive notice of the trust by an inadvertent disclosure, the purchaser, for his own protection, had to examine the terms of the trust.[342] Section 113 of the *Law of Property Act, 1925*[343] was a response to this problem, and provides as follows:

> 113.—(1) A person dealing in good faith with a mortgagee, or with the mortgagor if the mortgage has been discharged released or postponed as to the whole or any part of the mortgaged property, shall not be concerned with any trust at any time affecting the mortgage money or the income thereof, whether or not he has notice of the trust, and may assume unless the contrary is expressly stated in the instruments relating to the mortgage –
>
> (*a*) that the mortgagees (if more than one) are or were entitled to the mortgage money on a joint account; and
>
> (*b*) that the mortgagee has or had power to give valid receipts for the purchase money or mortgage money and the income thereof (including any arrears of interest) and to release or postpone the priority of the mortgage debt or any part thereof or to deal with the same or the mortgaged property or any part thereof;
>
> without investigating the equitable title to the mortgage debt or the appointment or discharge of trustees in reference thereto.
>
> (2) This section applies to mortgages made before or after the commencement of this Act, but only as respects dealings effected after such commencement.
>
> (3) This section does not affect the liability of any person in whom the mortgage debt is vested for the purposes of any trust to give effect to that trust.

By this section, the trustees for the time being are authorized to act as if they are absolute owners of the moneys that they, or their predecessors in title, have lent on the security of mortgaged land.[344]

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[342] See, generally, *Lewin on Trusts*, *supra*, note 18, at 374-75. See, also, *Underhill's Law relating to Trusts and Trustees*, *supra*, note 38, at 640. Case law has extended to conveyances and sales the principle of no notice: see *Underhill's Law relating to Trusts and Trustees*, *ibid.*, at 770

[343] *Supra*, note 100.

[344] See, generally, Megarry and Wade, *The Law of Real Property* (4th ed., 1975), at 953-54. It should be noted, however, that the debt as a chose in action, apart from the mortgage aspect, does vest in the new trustees as a result of a vesting declaration: see *Webb v. Crosse*, [1912] 1 Ch. 323, at 329.

Although section 9(3) of the Ontario *Trustee Act* incorporates the exception to an express vesting declaration for land subject to a mortgage, no provision similar to section 113 of the English *Law of Property Act, 1925* exists in Ontario. However, it is clear that section 113 is of much wider import than the exception in section 9(3) of the Ontario Act. Section 113 provides a conveyancing shield against notice of the trust in relation to subsequent transactions involving the mortgage loan, or the land after a foreclosure or discharge of a mortgage, and it applies not only where the mortgage has been transferred to new trustees, but also in every case where trustees are dealing with a mortgage. It also protects third parties entering into transactions concerning land that was once subject to a mortgage security held by trustees. The issue that now arises is whether the Ontario mortgage exception should be legislatively expanded in the manner adopted in England by section 113, or whether the revised Act should utilize the approach of section 113 not merely for all those concerned with mortgages held, or to be held, by the trust, but for all third parties involved in any dealings with trustees.

The Uniform Trustees' Powers Act, proposed by the National Conference of Commissioners on Uniform State Laws in the United States,[345] does, indeed, generalize this no notice concept. Section 7 provides as follows:

> 7. With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, the existence of trust powers and their proper exercise by the trustee may be assumed without inquiry. The third person is not bound to inquire whether the trustee has power to act or is properly exercising the power; and a third person, without actual knowledge that the trustee is exceeding his powers or improperly exercising them, is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the powers he purports to exercise. A third person is not bound to assure the proper application of trust assets paid or delivered to the trustee.

The protection afforded a purchaser by this provision is very broad. A third party is not bound to inquire whether the trustees have the power to act or are properly exercising that power, and a third party without actual knowledge to the contrary is fully protected.

We are impressed with the argument that, if practitioners are to be encouraged to use the non-judicial appointment and discharge power, they should not be exposed to the risk of inadvertently making the trust part of the title of the investment assets, a result that could occur by the use of a vesting declaration, express or implied. Similarly, even where trustees are appointed and vested with the trust property by a court order, production of the order to a third party would be notice that he is acquiring trust property and, therefore, would require him to investigate the terms of the trust to ensure that the trustees have the power they are purporting to exercise and that they are exercising the power properly, a task that may well prove a hindrance to sales, leases, mortgages, and other transactions entered into by the trustees.

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[345] American Uniform Act, *supra*, note 337.

In other words, we have asked ourselves whether a "sheltering provision" should be introduced in the revised Act whereby a *bona fide* purchaser would not be deemed to have notice of the trust by reason only of the production or registration of a vesting declaration, express or implied, or a court order appointing, discharging, or vesting trust property in trustees. This provision would apply whenever a purchaser deals with trustees in relation to any asset held, or to be acquired, by the trust. If such a sheltering provision were introduced, it would be of no concern to a *bona fide* purchaser who has no other notice of the trust whether or not the trustees have the particular power they are purporting to exercise or whether they are properly exercising that power. The effect of this approach would be that, if the purchaser knew of the trust solely through the production or registration of an instrument of appointment of trustees (or an express vesting declaration, if one exists), or a court order, he would be taken to have no actual, constructive, or imputed notice of the terms of the trust.

The shortcoming of a sheltering provision of this scope, however, is that a purchaser who acts in good faith throughout, but who learns of the existence of a trust *other* than through the production or registration of an appointment or vesting instrument, even if he otherwise knows of the trust by reason of such a production or registration, would not be within the protection of the provision. He would be bound to inquire into the trustees' powers, because he would be bound by constructive and imputed notice of the terms of the trust. Given the ease with which, through oral and documentary reference during the making of an agreement, a purchaser may become aware of the existence of a trust, it is highly questionable whether a sheltering provision of this limited scope is either practicable or justifiable. Moreover, it will have been seen from the previous discussion that neither section 113 of the English legislation, nor section 7 of the American Uniform Act, takes this approach. Section 113 confers protection upon the purchaser "whether or not he has notice of the trust", and section 7 protects the purchaser unless he has actual notice that the trustees lack the power they are purporting to exercise. Both section 113 of the English legislation and section 7 of the American Uniform Act, therefore, relieve a purchaser of liability for constructive or imputed knowledge.[346]

The purpose of a sheltering provision, in our view, should be to prevent an innocent purchaser, who at the time of entering into a transaction with trustees does not know of trustee wrongdoing or improper action, from having to inquire about the provisions of the trust instrument, so that it cannot be said afterwards that had he inquired he would have obtained information from which a reasonable man would have known that wrongdoing or impropriety had occurred or was occurring.

After careful consideration, the Commission has concluded that a provision dealing with the protection of third parties should be introduced in the revised Act, and that the approach of the American Uniform Trustees' Powers Act is the correct one. The elimination of constructive or imputed notice in relation to trustees' powers would complete the elimination of such notice with respect to all aspects of third party interaction with trustees. It will be recalled that we have previously recommended that a purchaser should be able to rely upon the validity of both the appointment and discharge of trustees and the vesting of trust property, unless the purchaser has actual knowledge of any impropriety relating to the appointment, discharge, or vesting. Actual notice by a third party of trustees' wrongful or otherwise improper acts or omissions would prevent him obtaining good title from the trustees, as the third party would be obliged to investigate the terms of the trust. Such a provision, in our view, properly balances the need to protect the interests of the beneficiaries and the administrative desirability of an effective and realistic non-judicial appointment and discharge procedure.

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[346] It is not clear whether section 113 of the English Act also protects a purchaser who actually knows that the trustees do not have the power they represent themselves as having; whereas section 7 of the American Uniform Act specifically withdraws protection from such a purchaser.

Accordingly, we recommend that a purchaser of trust property who relies upon the production or registration of a deed of appointment or a deed of discharge that contains a vesting declaration, express or implied,[347] whether or not he otherwise has notice of the trust, should be able to assume without inquiry that the former trustees and the substitute or additional trustees possessed or possess and properly exercised or are properly exercising every power which they purported or purport to exercise over the property.[348] However, this recommendation should only apply where the purchaser does not have actual notice that the trustees lack the power to act or are acting improperly. We, therefore, recommend that a purchaser of trust property who at the time of the purchase has actual notice that the trustees do not possess the power they purport to exercise, or that they are exercising a power improperly, should take the property subject to the trust unless title to the trust property has been held by a purchaser without actual notice that the trustees do not possess the power or that they are exercising the power improperly.[349] We also recommend that the provisions proposed previously in the context of the appointment and discharge of trustees concerning the protection that should be afforded to donees of trust property,[350] persons who have an obligation to register interests,[351] and subsequent purchasers who purported to act as trustees in the original transfer of trust property[352] should apply in this area as well.[353] In addition, we are of the view that these recommendations should apply equally where a purchaser of trust property relies upon the production or registration of a court order appointing or discharging a trustee or vesting trust property in the trustees.[354]

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[347] See *supra*, this ch., sec. 3, for a discussion of vesting declarations, and Draft Bill, s. 28.

[348] Draft Bill, s. 30(1).

[349] *Ibid.*, s. 30(2).

[350] See *supra*, note 221 and accompanying text.

[351] See *supra*, notes 223-26 and accompanying text.

[352] See *supra*, note 220 and accompanying text.

[353] Draft Bill, s. 30(3).

[354] *Ibid.*, s. 61(1), (2), and (3).

If these recommendations are accepted, it will no longer be necessary to except "land conveyed by mortgage for securing money subject to the trust" from the operation of a vesting declaration. We, therefore, further recommend that this exception, now contained in section 9(3) of the Ontario *Trustee Act*, should not be carried over to the revised Act.

It should be recalled that we have recommended that a vesting declaration should either be express or implied in a deed of appointment or discharge of trustees. It follows, therefore, that our recommendations to this point have been confined to adoption of the sheltering provision in those circumstances only where transactions are entered into by trustees who are different, in whole or in part, from the former or the original trustees. Original trustees would still be required to produce the trust instrument, and third parties, as at present, would carry out their self-protecting inquiries as to trustees' powers, because such parties would remain subject to the effects of constructive and imputed as well as actual notice.

We have given serious thought to whether this distinction between the position of original trustees and any subsequent trustee or different set of trustees can be justified, and we have concluded that it cannot. The reasons for our conclusion are as follows. Because of the relatively short duration of many trusts created today, or because a sole trustee may be corporate, there will often be no change of trustees during the lifetime of the trust. Many other trusts will be in effect for a substantial period of time before there will be any change. Although no problem concerning the change of trustees arises in these cases, we nevertheless are of the opinion that, if dispensing with the need for trustees to establish their powers is justifiable in some instances, there has to be a convincing argument for not dispensing with the need in all instances where trustees are engaged with third parties in transactions involving trust property. We do not think that such an argument exists given the character of section 113 of the *Law of Property Act, 1925*, in England, and section 7 of the Uniform Trustees' Powers Act now in effect in a number of American states – legislation that applies to all trustees' transactions.

Moreover, we do not consider that parties who deal with trustees should be subject to actual notice only in some instances, but actual, constructive, and imputed notice in other instances involving similar transactions. The result might well be confusion, and not a little irritation, among those who deal regularly with trustees. In short, we have concluded that either the sheltering provision should be adopted *in toto*, or should be rejected totally.

We are, therefore, of the view that the principle of sheltering, as recommended, should apply equally where there has been no change of trustees. We recommend that the revised Act should provide that, where a sole trustee or one or more trustees have been appointed by a trust instrument to act on the initial taking effect of the trust, and all or some of them have continued to act in the absence of an appointment of a substitute or additional trustee, they may by deed declare that they were appointed by the trust instrument, and the deed should have effect as if it were a deed of appointment containing a vesting declaration for the purposes of the application of the sheltering provisions.[355]

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[355] Draft Bill, s. 31.

Finally, we wish to address the difficulties that may arise where trustees assert to a purchaser that the trust instrument permits a majority to bind all the trustees and that they constitute a majority. Verification of this assertion by the purchaser with the minority trustees, who may not understand the implications of a majority clause in the trust instrument, may produce vague or unreliable responses. To insist that a purchaser in these circumstances inspect the trust instrument would defeat the purpose of providing that he may rely conclusively upon the vesting declaration. On the other hand, a purchaser would be proceeding at his peril if he relied solely upon the oral representations of the majority trustees concerning their ability to bind the trust, in the absence of a statement to this effect contained in the vesting declaration. Accordingly, we recommend that the revised Act should provide that, if original, substitute, or additional trustees assert to a purchaser that the trust instrument permits a majority to bind all the trustees and that they constitute a majority, the deed of appointment or the deed of discharge, or a deed executed by the original trustees, or, in either case, a supplemental deed, should contain a recital quoting the provision of the trust instrument to that effect, and that the recital is conclusive evidence of the facts so stated and shall operate to bind the trust in favour of a purchaser of trust property. However, the recital should not have the abovementioned effect in favour of a purchaser who at the time of the transaction has actual notice to the contrary, unless title to the trust property has been held by a purchaser without such acutal notice.[356]

5. PROTECTION OF THIRD PARTIES: SHOULD THE PROPOSED PROVISIONS BE MANDATORY?

Another matter that requires attention is whether the proposed provisions designed to protect third parties against improperly appointed trustees, the improper vesting of trust property, or trustees who lack the power to act or who are acting improperly should apply notwithstanding the expression of an intent to the contrary contained in the trust instrument. The Commission has considered this question and has concluded, for reasons set out below, that the proposed provisions should be mandatory.

It has been a fundamental premise of our recommendations relating to the non-judicial appointment and discharge power that, if use of this power is to be encouraged, third parties must be able to rely upon the mechanism as to the validity of appointment and discharge of trustees, the vesting of trust property, and the proper exercise of powers conferred upon trustees. This would be accomplished under our recommendations through the production of an instrument of appointment or discharge containing a vesting declaration, either express or implied; the instrument would assure the third party doing business with the trustees that the trustees are effectively appointed, vested with the trust property, and authorized to act in the way they are so doing. If our proposals were enacted as legislation, we believe that it would become the regular mode of business for trustees to employ the non-judicial power, and for persons doing business with trustees, other than the beneficiaries, to rely solely upon the appointment or discharge instrument. Such persons would seek to know no more of the trust, because they would need to know no more. Moreover, such an instrument would mean that trustees would not have to produce the trust instrument, something that would eliminate much paper work, and afford privacy to trust beneficiaries concerning their property interests.

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[356] *Ibid.*, s. 32(3) and (4).

It is obvious that the concept of an instrument of appointment and discharge containing a vesting declaration, express or implied, upon which third parties can rely absolutely is fundamental to our recommendations. If our proposed provisions designed to protect third parties were subject to a contrary intent contained in the trust instrument, the purchaser of trust property, notwithstanding these provisions, would not be able to rely upon a proffered appointment or discharge instrument. Rather, upon seeing the instrument, or becoming aware of the registration of such an instrument, he would have to examine the trust instrument in order to assure himself that the protection offered by the statutory provisions had not been excluded. Accordingly, we recommend that our proposed provisions that deal with the protection of third parties against improperly appointed trustees,[357] or trustees who do not have the power to act or are acting improperly,[358] and the provisions that deal with the vesting of trust property[359] should be mandatory, and our Draft Bill contains provisions to this effect.[360]

Finally, having regard to the significant scope of the proposed provisions that deal with the protection of third parties in their dealings with trustees, we are of the view that, except for an express vesting declaration having effect only as set out in section 9 of the present Ontario *Trustee Act*, the proposed sheltering provisions should only apply to deeds of appointment and of discharge and to vesting orders executed or made after the revised Act has come into force.[361]

RECOMMENDATIONS

The Commission makes the following recommendations:

1. Non-judicial appointment and discharge of trustees should be encouraged in Ontario and appointment and discharge by means of court application discouraged. Accordingly, the revised *Trustee Act* should retain the statutory non-judicial powers of retirement without replacement and replacement or removal by the appointment of a substitute trustee, but in an amended and improved form, so that they may be easily invoked and relied upon as to the validity of appointment, the vesting of trust property, and the proper exercise of powers conferred upon trustees.

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[357] *Supra*, this ch., sec. 2, and Draft Bill, s.27.

[358] *Supra*, this ch., sec. 4, and Draft Bill, ss.30, 31, 32, and 61.

[359] *Supra*, this ch., sec. 3, and Draft Bill, ss.28 and 29.

[360] Draft Bill, ss. 17(2) and 61(5).

[361] *Ibid.*, ss. 17(4) and 61(4).

2. The right of a trustee to retire non-judicially without replacement should continue to be subject to such consents as are now required under section 2 of the present *Trustee Act*.

3. The revised *Trustee Act* should permit non-judicial retirement without replacement where, after such retirement, there would remain a trust company or at least two individual trustees to act as trustees.

4. A trustee should be able to retire non-judicially, without the appointment of a substitute trustee, from a part of the trust and remain as trustee of the other part or of other parts, provided that the parts of the trust reflect separate property held on distinct trust terms.

5. The revised Act should provide that nothing in a trust instrument should withhold from a trustee the right to retire from the trust or a part thereof or make the requirements for retirement more onerous than otherwise provided by statute, and that any such provisions should be invalid for all purposes.

6. The statutory power to remove a trustee non-judicially by the appointment of a substitute trustee should continue to be subject to a contrary intent of the creator of the trust expressed in the trust instrument.

7. Notwithstanding the expression of a contrary intention by the creator of a trust, all instruments of appointment and of discharge of trustees, whether pursuant to a statutory authority or the trust instrument, should be by deed.

*8. For the purposes of the revised Act, a deed of appointment or of discharge of trustees should be an instrument signed by those persons who have the power to appoint or discharge the trustees, attested by one witness and accompanied by an affidavit of execution, but should not require a seal. In addition, a deed of appointment or of discharge should contain the following two recitals. First, where the appointment or discharge of a trustee is pursuant to a power contained in the trust instrument, the deed should set out the terms of the trust instrument that authorize the act. Secondly, where the trust instrument permits a majority of the trustees to bind all, this authority should be set out in the deed of appointment or of discharge (see, further, *infra*, Recommendation 84).

9. Where the appointment or discharge of a trustee does not comply with the provisions contained in Recommendations 7 and 8, the appointment or discharge should be invalid for all purposes.

10. With respect to the exercise of the non-judicial appointment power, the revised Act should provide that where a person is nominated in a trust instrument for the purpose of appointing substitute or additional trustees, he should be deemed to be nominated for the purpose of appointing

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* See, however, the comments of Dr. Derek Mendes da Costa, Q.C., Chairman of the Commission, *supra*, note 54.

substitute trustees in any of the circumstances set forth in the statute. The fact that the circumstances, if any, set forth in the trust instrument that empower the person therein nominated to act in the appointment of substitute trustees do not include all or any of the circumstances set forth in the statute should not itself constitute a contrary intent on the part of the person creating the trust that the statute is not to apply.

11. The section in the revised Act analogous to section 3(1) of the *Trustee Act* should retain the word "willing" with respect to the qualifications of a person nominated to appoint a substitute trustee.

12. The revised Act should contain a provision to the effect that, where jointly nominated persons are unable to agree in naming an appointee, they should be deemed to be unable to act within the terms of the section authorizing the non-judicial appointment of trustees.

13. For the purpose of exercising the non-judicial statutory power to appoint a substitute trustee, a surviving or continuing trustee should include:

    (a) a trustee who expresses in writing a desire to be discharged from all or any of the trusts or powers reposed in or conferred upon him; and

    (b) a sole trustee who expresses in writing a desire to be discharged from all or any of the trusts or powers reposed in or conferred upon him.

14. For the purpose of exercising the non-judicial statutory power to appoint a substitute trustee, a surviving or continuing trustee should not include:

    (a) a trustee who in writing disclaims the trust, or who, having neither disclaimed nor resigned, refuses to act as trustee, unless the trust instrument expressly authorizes such a person to make an appointment; or,

    (b) a trustee who is to be involuntarily removed.

15. Section 4 of the present Ontario *Trustee Act*, which empowers a sole trustee or the last surviving or continuing trustee to appoint by will a trustee to succeed him, should be retained in the revised Act.

16. The power to appoint a substitute trustee non-judicially should continue to be exercisable under the revised Act by the personal representatives of the last surviving or continuing trustee.

17. For the purpose of exercising the non-judicial statutory power to appoint a substitute trustee, the power conferred upon the personal representatives of a last surviving or continuing trustee should be exercisable by the executors for the time being of the last surviving or continuing trustee who have proved the will of the testator, or by the administrators for the time being of such trustee, without the concurrence of an executor who has renounced or has not proved.

18. The revised *Trustee Act* should not contain a provision similar to section 36(5) of the English *Trustee Act, 1925*, permitting a sole or last surviving executor intending to renounce probate, or all the executors where all intend to renounce, at any time before renouncing, to exercise the non-judicial power to appoint a substitute trustee conferred by statute upon the personal representatives of a last surviving or continuing trustee.

19. To ensure that a personal representative of a person who is appointed a trustee, but who predeceases the taking effect of the trust, cannot exercise the non-judicial power to appoint substitute trustees, the revised Act should expressly state that a surviving or continuing trustee does not include a person appointed a trustee who predeceases the taking effect of the trust for the purpose of exercising the non-judicial statutory power to appoint substitute trustees.

20. Subject to Recommendations 22 to 25, the circumstances, contained in section 3(1) of the present *Trustee Act*, in which the non-judicial power of removal and appointment of substitute trustees may be exercised should be carried over to the revised *Trustee Act*.

21. In the revised Act, as in section 3(1) of the Ontario *Trustee Act* at present, minority should not be a circumstance justifying non-judicial removal by the appointment of a substitute trustee.

22. The non-judicial removal of a trustee and the appointment of a substitute trustee should be permitted only in objectively ascertainable circumstances. In particular, incapacity and unfitness to act as trustee should no longer be circumstances that justify the non-judicial removal of a trustee, and they should not be included in the revised *Trustee Act*. Rather, removal for these reasons should be effected judicially, either under the proposed judicial statutory power of removal contained in Recommendation 35 or pursuant to the inherent jurisdiction of the court, with the non-judicial removal power in this regard limited to instances of mentally incompetent persons so found by a court of competent jurisdiction.

23. Insolvency should not be a ground permitting the non-judicial removal of a trustee and the appointment of a substitute trustee. Rather, the non-judicial power to remove a trustee should be exercisable in cases of bankruptcy alone. The term "bankrupt" should be defined to mean a person against whom a receiving order is in force, or who has made an assignment or a proposal under the *Bankruptcy Act* (Canada).

24. The revised Act should provide that where a corporate trustee is dissolved or is in liquidation, it may be subject to non-judicial removal under the statutory power.

25. Unlike the situation under section 3(1) of the Ontario *Trustee Act*, the fact that a trustee remains out of Ontario for more than twelve months should not in itself be a circumstance justifying non-judicial removal under the revised Act.

26. If, as proposed in Recommendation 33, a non-judicial power to appoint additional trustees is incorporated in the revised Act, it should no longer

be possible to appoint a substitute trustee under the non-judicial appointment power in circumstances where a person nominated trustee in a testamentary trust instrument predeceases the testator of the trust. Accordingly, a provision equivalent to section 8 of the Ontario *Trustee Act* should not be included in the revised Act.

27. To ensure that the non-judicial statutory power of removal is sufficiently comprehensive to include an original, substitute, or additional trustee, the revised Act should provide that it applies to all trustees however and whenever appointed.

28. The non-judicial statutory power of removal should apply equally to a person who is named a trustee but who has disclaimed in writing the office of trustee and never acted in that capacity (disclaiming trustee), and to a person who has accepted the office but who is unwilling to act or to act further as a trustee (refusing trustee).

29. The revised Act should provide that, where a trustee has been removed under a power conferred by a trust instrument, then, subject to the terms of a power of replacement in the trust instrument and subject also to Recommendation 37 concerning the maximum number of trustees, one or more substitute trustees may be appointed in the place of the removed trustee as if he had died or, in the case of a corporate trustee, as if it had expressed in writing a desire to be discharged from the trust.

30. The revised Act should provide that where a trustee refuses to act as trustee, is a mentally incompetent person, is convicted of an indictable offence, is bankrupt, or where a person appointed a trustee disclaims the trust in writing, or where a corporate trustee is dissolved or is in liquidation, and he does not voluntarily retire from the trust, his co-trustees may by deed declare him to be removed from the trust, if a trust company or at least two individuals to act as trustees to perform the trust will then remain, and he should be thereby discharged without any new trustee being appointed in his place.

31. With respect to the non-judicial statutory power, unless the court orders otherwise, the retirement, removal or replacement of a trustee and any consequential vesting order, declaration or conveyance, should not discharge any person from liability for his own acts or omissions or the acts or omissions of any former or continuing trustee.

32. Where a trustee establishes before the court that the alleged circumstances on the basis of which he was removed as trustee did not in fact exist, he should be able to claim an appropriate award of damages for wrongful removal against those persons who caused his removal.

33. As is the case under section 36(6) of the English *Trustee Act, 1925*:

    (a) the revised Act should contain a non-judicial power to appoint additional trustees;

(b) the persons entitled to appoint additional trustees should be the one or more persons nominated by the trust instrument for the purpose of appointing new trustees, or, if there is no such person or if there is no such person able and willing to act, then the trustee or trustees, other than a person appointed a trustee who in writing disclaims the trust or who, having neither disclaimed nor resigned, refuses to act as trustee; and

(c) the non-judicial power to appoint additional trustees should be subject to Recommendation 37 concerning the maximum permissible number of trustees.

34. Unlike the position under section 36(6) of the English *Trustee Act, 1925*:

(a) it should be possible under the revised Act to appoint a trustee who would be additional to a corporate trustee; and

(b) the revised Act should permit the persons nominated by the trust instrument for the purpose of appointing additional trustees to appoint themselves as additional trustees.

35. The revised Act should contain a judicial power of removal and appointment based on section 5 of the Ontario *Trustee Act*, which would enable the court to appoint one or more trustees where there is no existing trustee or uncertainty as to the existence or identity of any trustee or in substitution for or in addition to one or more existing trustees. In addition, the court should be able to remove one or more of the trustees, with or without the appointment of substitute trustees. However, in order to encourage use of the non-judicial power of appointment and discharge, the judicial power should be exercisable only in exceptional circumstances; that is, where it appears to the court to be in the best interests of a trust, and where appointment or removal would be inexpedient, difficult or impracticable without the assistance of the court.

36. The principles contained in section 5(2) of the Ontario *Trustee Act* should be retained, and the revised Act should provide that the judicial removal or replacement of a trustee, and any consequential vesting order, declaration, or conveyance should not discharge any person from liability for his own acts or for the acts or omissions of any former or continuing trustee.

37. (1) With regard to the non-judicial appointment of trustees, the revised Act should contain a provision to the effect that, except with the consent of the court and notwithstanding an expression of a contrary intent in the trust instrument, no trust shall have more than four trustees at any one time. If more than four persons are originally named as trustees, the first four named who are able and willing to act should alone be the trustees, and the other persons named should not be trustees unless appointed on the occurrence of a vacancy or with the consent of the court.

(2) This recommendation should apply only to trusts that take effect after the revised Act has come into force.

38. With respect to the judicial appointment of new trustees, whether substitute or additional, the number of trustees so appointed should be left to the discretion of the court.

39. Section 6(*a*) of the present Ontario *Trustee Act* should not be carried over to the revised Act.

40. The principles contained in section 6(*c*) of the Ontario *Trustee Act* relating to the non-judicial discharge and appointment of substitute trustees should be retained and expanded in the revised Act to apply to all cases where two or more trustees are originally appointed by the trust instrument; that is, two individuals or a trust company should be the minimum number of trustees permitted to administer the trust. Accordingly, the revised Act should provide that it is not necessary for more than one trustee to be appointed by way of substitution where only one trustee was originally appointed, but, except where only one trustee was originally appointed, a non-corporate trustee shall not act alone, and a trustee is not to be discharged unless there will be either a trust company or two or more individuals to act as trustees. However, the revised Act should provide that a person may apply to the court for consent to continue to act as a sole trustee.

41. In relation to the judicial discharge of a trustee, the court should be empowered to determine the permissible minimum number of trustees that may remain in office having regard to the best interests of the trust.

42. Section 6(*b*) of the Ontario *Trustee Act* should be retained in relation to the appointment of a substitute trustee, but should be extended in the revised Act to apply to the appointment of an additional trustee. The revised Act should contain a provision to the effect that, where it would assist in the administration of the whole or any part of a trust or where it would benefit beneficiaries of a trust, one or more separate trustees may be appointed, whether any such person or persons be an original, substitute or additional trustee or trustees, for any part of the trust property held on trusts distinct from those relating to any other part, but a separate sole trustee should be appointed in those circumstances only where a sole trustee was originally appointed, and for each separately administered part the limitation upon the number of trustees to four, except with the consent of the court, should apply.

43. The revised Act should contain a provision to the effect that every substitute or additional trustee appointed under the Act, before and after all trust property becomes vested in him, has the same powers, authorities, and discretions and may in all respects act as if he had been originally appointed a trustee by the trust instrument.

44. A comprehensive provision designed to protect a purchaser of trust property against improperly appointed or discharged trustees should be introduced. Accordingly, the revised Act should provide that, subject to the provisions of Recommendation 45, a deed of appointment or a deed of discharge of a trustee, whether pursuant to the Act or the trust instrument,

should be conclusive evidence of the validity of the appointment or discharge in favour of a purchaser of trust property.

45. The revised *Trustee Act* should provide that a purchaser of trust property who at the time of the purchase has actual notice that an improper act or omission has occurred in the appointment or discharge of a trustee is not entitled to rely upon the validity of the deed of appointment or the deed of discharge unless title to the trust property has been held by a purchaser without actual notice of the improper act or omission.

46. The revised Act should contain a provision to the effect that the provisions of Recommendation 44 apply to

    (a) a subsequent purchaser who purported to act as a trustee in the original transfer of trust property, except that such a purchaser does not take valid title from a purchaser without actual notice of any impropriety referred to in Recommendation 45; and

    (b) a donee of property that was originally trust property, if the title has been held by a purchaser without actual notice of any impropriety referred to in Recommendation 45.

47. The revised Act should contain a provision to the effect that any official, including the Director of Titles, a land registrar, and any other person registering or certifying instruments or titles, who makes an entry in a book or other record in reliance upon an instrument of appointment or of discharge of a trustee or upon any vesting declaration, express or implied, consequent upon an appointment or discharge of a trustee, shall be afforded protection equivalent to the protection afforded a third party against improperly appointed trustees as proposed in Recommendation 44.

48. Actual notice should not be deemed to have been obtained by a person referred to in Recommendation 47 merely because the trust instrument or a part thereof or a copy thereof is attached to or otherwise accompanies the deed of appointment or the deed of discharge, or because an express vesting declaration is contained in the deed of appointment or discharge.

49. There should be introduced into the revised Act an improved form of express vesting declaration based upon section 9(1) of the Ontario *Trustee Act* to the effect that a deed, by which one or more substitute or additional trustees are appointed, or by which a trustee is discharged without another trustee being appointed, may contain an express declaration that the trust property vests in the one or more trustees who shall perform the trust as of the date of the instrument or such other date as is stated in the instrument for that purpose.

50. The concept of an implied vesting declaration should be introduced into Ontario. Accordingly, the revised Act should provide that where a deed by which one or more substitute or additional trustees are appointed, or by which a trustee is discharged without a new trustee being appointed, does not contain an express vesting declaration, a declaration that the

trust property vests in the one or more trustees who shall perform the trust should be implied as of the date of the instrument.

51. Subject to Recommendations 57, 59, 60 and 61, a vesting declaration, express or implied, should take effect as to all trust property, notwithstanding that any estate, interest or right forming the whole or part of the trust property is not expressly referred to in the instrument.

52. A provision, modelled on section 49 of the English *Trustee Act, 1925*, but expanded to cover all types of property, specifying the effect of an express or implied vesting declaration should be introduced in the revised Act. The revised Act should provide that, subject to Recommendations 57, 59, 60 and 61, a vesting declaration, express or implied, should take effect as if the estate, interest or right in the property had been actually conveyed or transferred by deed or otherwise to the one or more persons in whom the trust property is declared, expressly or impliedly, to be vested, or, in the case of a chose in action, as if it had been actually assigned to the last-mentioned person or persons. As this recommendation incorporates the principle of section 6(*d*) of the Ontario *Trustee Act*, section 6(*d*) should not be carried over to the revised Act.

53. The revised Act should contain a provision to the effect that, subject to the provisions of Recommendation 54, a vesting declaration, express or implied, consequent upon any appointment or discharge of a trustee, is conclusive evidence of the validity of vesting of trust property in favour of a purchaser of trust property.

54. A purchaser of trust property who at the time of the purchase has actual notice that an improper act or omission has occurred in the vesting of the trust property should not be entitled to rely upon the validity of the vesting declaration unless title to the trust property has been held by a purchaser without actual notice of the improper act or omission.

55. For the purpose of Recommendation 53, the proposals contained in Recommendations 46, 47, and 48 should apply, *mutatis mutandis*.

56. The revised Act should make it clear that a vesting declaration, express or implied, should convey, transfer, or assign to the new trustees the same estate, interest or right in the property as held by the former trustees.

57. The revised Act should provide that where the estate, interest or right takes the form of a chose in action, a vesting declaration, express or implied, should be deemed an absolute assignment within the meaning of section 53 of the *Conveyancing and Law of Property Act*, and until express notice in writing is given by the newly vested persons to the debtor or other person obligated under the chose in action, the vesting declaration should have effect only as an assignment in equity from the formerly vested persons to the newly vested persons.

58. The exception from the operation of an express vesting declaration contained in section 9(3) of the Ontario *Trustee Act* with respect to any property transferable in a manner prescribed by legislation, but where

registration is not required to transfer title, should not be carried over to the revised Act. Rather, title to such property should be transferred by the operation of the proposed express or implied vesting declaration as provided in Recommendations 49 and 50.

59. It should be the duty of both the formerly vested persons and the newly vested persons to ensure that the trust property is actually delivered to the newly vested persons, but where inspection, cancellation, or endorsement is required by any registering authority and the property cannot be produced, the newly vested persons should be able to apply for registration or recording in the same manner and subject to the same terms and conditions as if the property had been lost.

60. Where actual delivery of trust property has not taken place but transfer has occurred by operation of a vesting declaration, express or implied, no right of security or other personal interest of any person in that property should be destroyed by reason only of the operation of a vesting declaration.

61. Where an estate, interest or right in property can be transferred only by a registration or recording in a book or similar record, the vesting declaration, prior to the registration or recording, should confer such rights upon the person so vested as he would have in equity, and it should be the duty of such person to apply for the required registration or recording.

62. Leasehold property should not be excepted from the operation of a vesting declaration, express or implied, under the revised Act. However, in order to avoid the possibility that an assignment might constitute a breach of covenant, the revised Act should provide that, where leasehold property is subject to a trust, the vesting of the property in one or more substitute or additional trustees pursuant to a vesting declaration, express or implied, should not constitute a breach of any covenant or condition against assignment, subletting, or parting with possession of the property, whether absolute or with consent, made by one or more former trustees and, notwithstanding any term in the lease to the contrary, should not give rise to any forfeiture, right of re-entry, or other claim for breach of such covenant or condition.

63. Sections 10 and 13 of the present Ontario *Trustee Act* should be amalgamated, and the new section in the revised *Trustee Act* should empower the court to make vesting orders in relation to any kind of trust property or interest in trust property.

64. Rather than provide a specific list of circumstances in which the court is empowered to make vesting orders, the revised *Trustee Act* should provide that, where it appears to the court to be in the best interests of the trust, the court may vest the trust property or an interest therein in one or more persons in such manner, for such estate or interest, and on such terms as the court orders.

65. The authority contained in sections 10 and 13 of the present *Trustee Act* to vest trust property where there is uncertainty concerning the existence

or identity of a trustee, or where a trustee is incapable of acting, or refuses to act should not be carried over to the revised Act. Rather, these matters should be dealt with by the court pursuant to its authority to remove and appoint substitute and additional trustees contained in Recommendation 35.

66. The revised *Trustee Act* should provide that, where a trustee is under a disability that temporarily precludes his participation in the administration of the trust, or where a trustee is, by reason of temporary absence, unable to participate in the administration of the trust, and it appears to the one or more other trustees that it is desirable to proceed immediately to deal with the whole or a part of the trust property, and the circumstances, in the opinion of the court, do not justify the removal of the trustee who is under the disability or who is absent, the court may vest the whole or such part of the trust property in the trustee or trustees, other than the trustee who is under the disability or is absent, in such manner, for such estate or interest, and on such terms as the court orders.

67. The revised *Trustee Act* should provide that, where an order has been made vesting trust property in the able and remaining trustees, persons acquiring any trust property vested in the remaining trustees by such order acquire the title thereto that they would have acquired if the trustee under disability or absent had been *sui juris* and had executed and joined in the delivery to them of the conveyance, transfer, or assignment of the trust property, or had joined in the delivery to them of the trust property itself, as the case may be.

68. The revised *Trustee Act* should provide that a dealing with trust property vested temporarily in remaining trustees by a vesting order is not a breach of trust merely because the trustee under disability or absent did not join or concur in the dealing.

69. The revised *Trustee Act* should provide that, on the cessation of the disability or absence of a trustee, the court may make an order revesting the trust property, or such of it as remains subject to the trust, and any property received in exchange for it, in all of the trustees.

70. Subject to Recommendation 71, the revised *Trustee Act* should empower the court to make orders vesting trust property in such persons as it thinks fit.

71. The revised Act should provide that, where a vesting order is consequential on the appointment of one or more new trustees, or on the retirement or removal of a trustee without the appointment of a new trustee in place of the trustee retiring or removed, the court should vest the trust property in the person or persons who, on the appointment, retirement, or removal, are the trustees.

72. The revised *Trustee Act* should contain a provision, similar to section 79 of the *Judicature Act*, to the effect that a vesting order under the Act has the same effect as if the legal or other estate or interest in the property had been actually conveyed by deed or otherwise for the same estate or

interest to the person in whom the property is ordered to be vested or, in the case of a chose in action, as if it had been actually assigned to the last-mentioned person.

73. The revised *Trustee Act* should provide that, where leasehold property is subject to a trust, the vesting of the property in one or more new trustees pursuant to a vesting order does not constitute a breach of any covenant or condition against assignment, subletting, or parting with possession of the property, whether absolute or with consent, made by one or more former trustees and, notwithstanding any term in the lease to the contrary, does not give rise to any forfeiture, right of re-entry, or other claim for breach of such covenant or condition.

74. Section 13(4) of the present *Trustee Act* should be carried over, in an expanded form, to the revised *Trustee Act*. The revised Act should state that, where the revised Act provides for the making of a vesting order, the court may, in lieu thereof, appoint a person to make or to join in making the transfer of trust property.

75. Section 11 of the present *Trustee Act* should be retained, but should be relocated in amended form in the *Conveyancing and Law of Property Act*.

76. Section 12 of the present *Trustee Act* should be retained, but should be relocated in amended form in the *Children's Law Reform Act*.

77. The revised *Trustee Act* should provide that for the purpose of vesting any property in the trustees of any charity, the court may exercise any of the powers proposed in Recommendations 63 to 73.

78. A sheltering provision based on section 7 of the American Uniform Trustees' Powers Act should be introduced in Ontario. The revised Act should provide that, subject to Recommendation 79, a purchaser of trust property who relies upon the production or registration of a deed of appointment or a deed of discharge that contains a vesting declaration, express or implied, whether or not he otherwise has notice of the trust, should be able to assume without inquiry that the former trustees and the substitute or additional trustees possessed or possess and properly exercised or are properly exercising every power which they purported or purport to exercise over the property.

79. The revised *Trustee Act* should provide that a purchaser of trust property who at the time of the purchase has actual notice that the trustees do not possess the power they purport to exercise, or that they are exercising a power improperly, takes the trust property subject to the terms of the trust unless title to the trust property has been held by a purchaser without actual notice that the trustees do not possess the power or that they are exercising the power improperly.

80. For the purposes of Recommendation 78, the proposals contained in Recommendations 46, 47, and 48 should apply.

81. Recommendations 78, 79, and 80 should apply where a purchaser of trust property relies upon the production or registration of a court order appointing or discharging a trustee or vesting trust property in the trustees.

82. The exception, now contained in section 9(3) of the *Trustee Act*, relating to "land conveyed by mortgage for securing money subject to the trust" should not be carried over to the revised Act.

83. The revised Act should provide that, where a sole trustee or one or more trustees have been appointed by a trust instrument to act on the initial taking effect of the trust, and all or some of them have continued to act in the absence of an appointment of a substitute or additional trustee, they may by deed declare that they were appointed by the trust instrument, and the deed should have effect as if it were a deed of appointment containing a vesting declaration for the purposes of the application of the proposed sheltering provisions.

84. The revised Act should contain a provision to the effect that, if original, substitute or additional trustees assert to a purchaser that the trust instrument permits a majority to bind all the trustees and that they constitute a majority, the deed of appointment or the deed of discharge, or a deed executed by the original trustees, or, in either case, a supplemental deed, should contain a recital quoting the provision of the trust instrument to that effect, and that the recital is conclusive evidence of the facts so stated and shall operate to bind the trust in favour of a purchaser of trust property. However, where, at the time of the transaction, the purchaser has actual notice to the contrary, the recital should not have the recommended effect unless title to the trust property has been held by a purchaser without such actual notice.

85. The recommendations that deal with the protection of third parties against improperly appointed trustees and against trustees who lack the power to act or who are acting improperly, and the recommendations that deal with the vesting of trust property should be mandatory and therefore not subject to exclusion by a contrary intent expressed in the trust instrument.

86. Except for an express vesting declaration having effect only as set out in section 9 of the present Ontario *Trustee Act*, the proposed sheltering provisions should only apply to deeds of appointment and of discharge and to vesting orders executed or made after the revised Act has come into force.

CHAPTER 4

ADMINISTRATIVE POWERS OF TRUSTEES

1. INTRODUCTION

A trustee, although vested with title to trust assets, is denied the powers of disposition and management that are enjoyed by an absolute owner. The trustee must manage the trust assets on behalf of others according to the authority conferred upon him by the trust instrument or by statute, and must act with "vigilance, prudence and sagacity".[1] Generally, the administrative powers conferred upon a trustee by the trust instrument will complement the intended object of the trust. However, over the years, the purposes for which trusts are created have undergone significant change.

In England in the eighteenth and nineteenth centuries, the usual object of a trust was the preservation of an estate of land, including a "mansion house", for successive generations of the family of the creator of the trust. Trustees needed the power to manage the property as would an estate holder. In a well-drawn instrument, trustees would have been empowered to mortgage, lease, carry out repairs to the buildings, erect buildings, enter into agreements concerning easements and covenants, and engage in a number of similar acts. However, it is unlikely that the trustees would have been empowered to sell the land or, indeed, any part of it, since the whole purpose of the trust was to preserve that particular land and house for the family.

With the growth of mercantilism in the eighteenth century, the so-called "traders' trust" became familiar. As with the settlement of land, the creator of this trust would usually have had in mind the welfare of his family, but, unlike the strict settlement, the assets conveyed to trustees would have been mixed in kind, comprising both land and securities. The task of the trustees would have been to invest those assets in such a way that they would be as productive as possible for the beneficiaries, within the criteria of sound investment. Such trustees would have needed powers not only to ensure that land and other assets held by the trust were properly managed, but also to sell the trust assets when this would have been a wise course of action. Trustees would also have needed the power to deal with securities as an investment; that is, to buy and sell, to exchange, to agree to the reorganization of companies and to amalgamations, and, generally, to handle a portfolio of securities as would any investor.

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[1] *Fales, Wohlleben v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302, at 318, (1977), 70 D.L.R. (3d) 257, at 270, [1976] 6 W.W.R. 10, at 22 (S.C.C.).

Today, trust instruments have different objects in many respects from those drawn in the nineteenth and early part of the twentieth century. In particular, tax-saving has become an increasingly significant object of *inter vivos* trusts. Such trusts, and testamentary trusts faced with the same incidence of high taxation, often confer upon trustees extensive discretionary powers in relation to the administration of trust property, powers that would possibly have been unknown and, indeed, unacceptable in earlier times. Even if tax-saving is not a primary reason for the creation of a trust, changed economic circumstances and new taxation provisions have rendered largely obsolete certain administrative powers that were widely employed only a few years ago.[2]

Legislation did not intervene in the area of trustee administrative powers until almost the middle of the nineteenth century.[3] At that time, legislators began to confer upon trustees certain administrative powers that well advised settlors and testators typically gave to their trustees. These powers applied to the management of both land and securities, but they were not imposed upon those creating trusts. The object of the legislation was to ensure that powers normally contained in trust instruments would not be denied trustees if, by inadvertence, they had been omitted from the trust instrument. The legislators foresaw that some settlors and testators might not wish to have any of these statutory powers apply to their trusts, and the legislation provided, therefore, that the powers would be read into each trust instrument only so far as they were not expressly or impliedly excluded.

This practice, initiated by the trustee legislation of England, was adopted in most Commonwealth jurisdictions. Today, for example, the trustee legislation of the common law provinces and the territories of Canada, the states of Australia, and New Zealand incorporates, in some form, an extensive set of administrative powers, which the creator of a trust is free to amend or reject, expressly or impliedly, as he desires. However, with the development of the trust from an instrument concerned with the preservation of an estate in land to a complex device of tax-saving and investment management, the administrative powers that are widely employed today are conferred, for the most part, by the trust instrument and bear little resemblance to many of the powers contained in trustee legislation.

The questions that arise, therefore, are whether the revised Act should continue the tradition of enumerating specific administrative powers and, if so, the powers that should be specified, and the form that they should take. In addressing these questions, this chapter will examine the following topics:

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[2] For example, in light of the taxation provisions concerning spousal trusts, the insertion in the trust instrument of a power of advancement in favour of the remainderman with the consent of the life tenant, where the latter is the surviving spouse, would now taint the spousal trust.

[3] Trustee administrative powers first became the subject matter of legislation in England in *An Act for better securing Trust Funds, and for the Relief of Trustees* (1847), 10 & 11 Vict., c. 96 (U.K.).

(1) the power of investment; (2) ancillary powers of property management; and (3) the power to allocate receipts and disbursements between income and capital beneficiaries.

2. THE POWER OF INVESTMENT

(a) INTRODUCTION

The investment policy of modern trustees, whether the trust owns one asset, such as a mortgage debt, or a portfolio of securities, can have a profound effect on the degree of real benefit obtained from the trust by its beneficiaries. Generally, every trustee has the duty to conduct all trust affairs with "vigilance, prudence and sagacity".[4] In relation to trust property, unless the trust instrument provides to the contrary, trustees must ensure that all trust assets are productive to the maximum degree that the market permits, short of speculation. As a result, trustees are required to sell, purchase, and invest assets in the same manner as would a prudent man of business in the circumstances. Trustees must be aware both of income return and of capital appreciation, a factor that will be of particular significance if the trust is in favour of both income and capital beneficiaries. They must have in mind not only the objects that the trust seeks to achieve, but also that they are investing the assets of others for their benefit. These considerations require conservatism and forbid speculation.

In Ontario, the statutory power of investment has, since its inception over one hundred years ago, permitted investment by trustees only in certain kinds of securities, commonly referred to as the legal list.[5] The statutory legal list of authorized investments applies to all trustees, unless the trust instrument provides otherwise, that is, unless the settlor or testator chooses either to confer upon his trustees broader powers of investment or to restrict the application of the statutory powers.[6] In this portion of the chapter, we shall examine the utility of retaining the statutory legal list in the revised Act, and, in this regard, the following topics will be discussed: (1) the statutory legal list investment power, its history and status today; (2) the "prudent man" rule of investment; (3) the objectives and problems of contemporary trustee investment; and (4) the alternative approaches to, and recommendations for, reform.

(b) THE LEGAL LIST

(i) The Ontario *Trustee Act*

The legal list of authorized investments is contained in sections 26 and 27 of the Ontario *Trustee Act*. These sections prescribe a range of securities in which trust assets may be invested, and provide that a trustee may invest trust money in his hands in these classes of securities, but only if the investment is "in other respects reasonable and proper".[7] In this way the sections incorporate the common law rule of prudence.[8]

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[4] *Supra*, note 1.

[5] The legal list of authorized investments was first introduced in Ontario by *An Act to Confer certain Powers on Trustees and Executors* (1868-69), 32 Vict., c. 37, s. 1.

[6] *Trustee Act*, R.S.O. 1980, c. 512, ss. 26, 27, 67, and 68.

The investments contained in section 26 include the securities of the Canadian federal government, any provincial government, the United Kingdom government, and any Canadian municipal corporation, including taxation secured bonds within Canada. Section 26 also lists as authorized investments first mortgages on real estate in Canada, Government of Canada subsidy bonds, loan company debentures, trust company guaranteed investments, securities of the International Bank for Reconstruction and Development, and finally deposit documentation issued or endorsed by any Canadian chartered bank.

Section 27 provides that, in addition to the investments authorized by section 26, a trustee holding trust money for investment may invest such money in the classes of investment authorized by the section. These investments include bonds or similar securities issued by any corporation incorporated in Canada, provided that the issue is secured by a trust deed on specified assets of the corporation or by a federal or provincial guarantee of payment. Debt securities or preferred shares of any corporation are also authorized by this section, provided that in either case the interest set has been paid for each year of the five years preceding any investment by the trustee, and a dividend of at least four percent has been paid on the corporation's common shares for each year of the previous five years. Common shares may be the subject matter of investment, but only on the condition that the corporation in question has paid a dividend of at least four percent on those shares in each year of the previous seven years.

While each section lists authorized investments, the greater part of the trust assets must be invested in section 26 securities. This is required by section 27(2) of the Act, which prescribes that no more than thirty-five percent of the trust assets may be invested in section 27 securities. However, section 27(3) adds that no sale or liquidation of investments is called for by reason only of any change in the ratio between the market value of section 27 investments and the market value of the whole of the trust estate. Aside from this restriction, the Ontario *Trustee Act* does not specify further how the investment of trust assets should be distributed between section 26 and 27 securities: that is, the Act imposes no express duty to diversify investments, and it is not clear whether case law insists upon diversification as a measure of prudence.[9] It may be argued therefore that, whether trustees are limited to statutorily authorized investments, or are given a wider power of investment under the trust instrument, if the investment is held to be "in other respects reasonable and proper" within the meaning of the Act, trustees will not have acted improperly even if they invest the whole of the trust assets in section 26 bonds.

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[7] *Trustee Act*, *ibid.*, ss. 26-27

[8] See Waters, *Law of Trusts in Canada* (1974), at 685-87, for an analysis of the common law standard of care required of trustees in relation to their investment powers.

[9] See *Re Smith*, [1971] 1 O.R. 584, 16 D.L.R. (3d) 130, aff'd [1971] 2 O.R. 541, 18 D.L.R. (3d) 405 (C.A.). Although the case was decided and upheld on the ground that the trustee had failed to hold an even hand between the income and capital beneficiaries, Keith J. noted that the trustee had not failed to exercise prudence and reasonable care when he had failed to diversify the investment of the fund. In the case, however, while the single investment had a low income return, there was a significant capital gain for the trust. As Waters points out, one wonders whether a trustee would be liable for, among other things, a failure to diversify, if both the income and capital return of the investment had declined substantially: see Waters, *supra*, note 8, at 688.

Sections 28 to 32 contain supplementary provisions on the subject of trustee investment. Section 28 designates the institutions in which trustees may deposit trust money prior to investment. Section 29 empowers trustees to vary or transpose any trust investment into or for any other security authorized by the statutory legal list. Section 30, in effect, prohibits trustees from investing in mortgages or other secured loans until they are advised on each occasion by a valuator; in this event, they may advance no more than three-quarters of the valuation given. If they do advance more, and the investment is otherwise proper, section 31 provides that they are only liable for breach to the extent by which the amount advanced is in excess of the authorized amount. Lastly, section 32 provides that trustees shall not be liable for breach by reason only of continuing to hold an asset that has ceased to be an investment authorized by the instrument or by the statute.

Before considering what types of change, if any, should be made to the Ontario *Trustee Act* investment powers, it will be useful to examine the historical background of the legal list in both England and the Commonwealth.

(ii) The History of the Legal List

a. England

The investment role of trustees developed in England during the late seventeenth and early eighteenth centuries. The overseas territories that England began to acquire in the early seventeenth century, and the growth in that century of the chartered trading companies,[10] were both factors in the expansion of trade. These companies brought with them the concept of stock and, as the seventeenth century came to a close, the English government – the government of Great Britain, as it was to become in 1707 – also issued securities against the indebtedness that it had incurred for national expenditure purposes. The existence of government, Bank of England, and trading company securities encouraged investment by residents of Britain in assets other than land.

In the first decade of the eighteenth century, those with funds to invest took advantage of the new and exciting prospects of rapidly acquired wealth that the novel investments appeared to offer. Indeed, there is evidence from the law reports that the courts saw no reason why trust funds should not also be invested in the same manner.[11] To modern eyes the stock organization of these early companies was unsophisticated. Security existed only so long as successful trading continued. If a company were to falter, the outcome was usually irrecoverable loss to the investors. At that time there was a lack of reasonable caution concerning investment of funds in these trading ventures.

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[10] The East India Company was founded in 1600, and the Hudson's Bay Company in 1670. The Bank of England was established in 1694, and 1693 marked the beginning of the National Debt.

A sketch of the history of this period, however brief, would not be complete without mention of the South Sea Company, founded in 1710, and the governmental sanction that was given to the company's plan to buy out the holders of the National Debt through the issue of its stock.[12] The Company was formed to trade in the Pacific Ocean area and in the Americas, an attractive market. However, speculation was so intense and the issue of stock so considerable that, although Parliament at Westminster attempted to curb the early flood of speculative buying,[13] the "Bubble" burst. The ruin for many investors was complete, and investments that were lost included the funds of many trust beneficiaries. The ultimate collapse, ending the boom, left a tide of apprehension regarding any trustee investment in trading companies, which was to last until well into the nineteenth century.

The liberal approach of the courts to the investment of trust funds was dramatically reversed as soon as the South Sea Bubble collapsed.[14] This reaction resulted in the "court-made list" of authorized investments for trustees, which was the forerunner of the statutory "legal list". Unless expressly permitted by the trust instrument,[15] or authorized by Parliament, the English courts thereafter did not allow trustees to invest in the stocks of private enterprises. After the collapse, the courts allowed investment only in Bank of England three percent Consolidated Annuities.[16] The stock of the Bank itself was excluded, even though it was a perfectly safe security.[17] Also excluded were all public annuities that were not government annuities and, indeed, government or bank annuities other than the Bank of England three percent Consolidated Annuities.[18] Even first mortgages, although favoured by some Chancery courts,[19] did not receive general judicial approval.[20] However, if loss ensued by reason of investment in Bank of England three percent Consolidated Annuities, trustees might effectively defend themselves on the ground that they had invested in the "court-made list".[21]

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[11] See, for example, *Trenchard v. Wanley* (1723), 2 P. Wms. 166, at 168, 24 E.R. 685, at 685-86 (Ch.), and *Jackson v. Jackson* (1737), 1 Atk. 513, at 514, 26 E.R. 324, at 325 (Ch.).

[12] *South Sea Company Act* (1710), 9 Anne, c. 21 (U.K.). The South Sea Company was thereafter incorporated as "The Governors and Company of Merchants of Great Britain trading to the South Seas and other Parts of America and for encouraging the Fishery". That the government encouraged fiduciaries to invest in the stock of the South Sea Company is evidenced by *An act for enabling the South-Sea Company to encrease their present capital stock and fund etc*. (1719), 6 Geo. 1, c. 4, s. 23 (U.K.).

[13] *Royal Exchange and London Assurance Corporations Act* (1719), 6 Geo. 1, c. 18 (U.K.). The so-called "Bubble Act" was designed to end the problem, but it caused such a panic that the company was saved from oblivion only by further governmental intervention: see, generally, Gower, Cronin, Easson, and Wedderburn (eds.), *Gower's Principles of Modern Company Law* (4th ed., 1979), at 28-32.

[14] See, for example, *Trafford v. Boehm* (1746), 3 Atk. 440, at 444, 26 E.R. 1054, at 1056 (Ch.), and *Adye v. Feuilleteau* (1783), 1 Cox 24, at 26, 29 E.R. 1045, at 1046 (Ch.), where Baron Hotham called investment in private securities "a species of gambling".

[15] Even where the trust instrument permitted investment in private securities, the courts construed the enabling power strictly: see *Trafford v. Boehm*, *supra*, note 14, at 444 (Atk.), 1056 (E.R.).

[16] This was the investment traditionally employed by the courts for the investment of funds in court: see *Peat v. Crane*, cited in *Hancom v. Allen* (1774), Dick. 498, at 499, 21 E.R. 363 (Ch.).

[17] *Howe v. Lord Dartmouth* (1802), 7 Ves. Jun. 138, at 150, 32 E.R. 56, at 61 (Ch.), *per* Lord Eldon (subsequent references are to 32 E.R.).

As late as the mid-nineteenth century, when confidence in investments other than Bank of England three percent Consolidated Annuities began to return, the courts condoned, but did not encourage, mortgage investment.[22] The fear was still that the security, the land, might diminish in value. Gradually, government securities began to earn judicial consent. Nonetheless, Parliament was consistently looked to as the only body that should authorize change in permissible trustee investment practice, unless, of course, the settlor or testator had seen fit to confer additional investment powers upon his trustees.

In 1859, Parliament intervened to broaden the investment power of trustees by the introduction of the "legal list" of trustee investments. An Act of that year, commonly known as *Lord St. Leonard's Act*,[23] authorized as trustee investments the stock of the Bank of England and Ireland, thereby reversing the judicial prohibition against investment in bank stock. Further, the Act settled the difference of judicial opinion concerning mortgage investment in that it permitted trustees to invest in mortgages of real property in England, Wales, and Ireland. In addition, the Act approved as an authorized investment the stock of the highly successful East India Company. Parliamentary action continued and, in 1860,[24] the Court of Chancery was empowered to authorize investment "in three percent Consolidated or Reduced, or New Bank Annuities, or in such other stocks, funds or securities" as it thought fit.[25] However, in 1888, the interest on Consolidated Annuities was statutorily reduced to two and one-half percent,[26] an event that prompted the demand for real change in the range of trustee investments. Trustees and their advisers looked to Parliament to authorize investment in the new commercial wealth of the country. As a result, in 1889, the debentures and preference shares of railway companies, provided those companies had paid at least a three percent dividend on their common stock in each of the two previous years, were added to the legal list.[27] In 1893, the two year dividend requirement was extended to ten, due to the heavy post-1889 investment in railways.[28] Also in 1893, the legal list was increased by the addition of securities of large municipalities, certain utilities, and Indian government and railway securities.[29] By this latter addition, trustees could invest for the first time in the wealth generated by the Empire, a process that gathered momentum in 1900, when trustees were allowed to invest in a large number of colonial stocks, as long as the stocks were registered in England.[30]

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[18] Bank of England three percent Consolidated Annuities were presumably preferred because their low rate of interest made them least likely to be redeemed. As a result, even four and five percent annuities would be ordered to be sold and reinvested in the three percent annuities: see *Howe v. Lord Dartmouth*, *ibid.*, at 61-62.

[19] See, for example, *Brown v. Litton* (1711), 1 P. Wms. 140, 24 E.R. 329 (Ch.); *Knight v. Earl of Plymouth* (1747), Dick. 120, 21 E.R. 214 (Ch.); and *Pocock v. Reddington* (1801), 5 Ves. Jun. 794, 31 E.R. 862 (Ch.).

[20] *Ex p. Cathorpe* (1785), 1 Cox 182, 29 E.R. 1119 (Ch.).

[21] *Howe v. Lord Dartmouth*, *supra*, note 17, at 61.

[22] *Raby v. Ridehalgh* (1855), 7 De G.M. & G. 104, 44 E.R. 41 (Ch. D.); *Howe v. Lord Dartmouth*, *supra*, note 17, at 61.

[23] *Law of Property Amendment Act, 1859*, 22 & 23 Vict., c. 35, s. 32 (U.K.).

[24] *Law of Property Amendment Act, 1860*, 23 & 24 Vict., c. 38, s. 11 (U.K.).

[25] See, generally, Mowbray (ed.), *Lewin on Trusts* (16th ed., 1964), at 322.

[26] *National Debt (Conversion) Act, 1888*, 51 & 52 Vict., c. 2 (U.K.).

These authorized investments were consolidated in the English *Trustee Act, 1925*,[31] and the character of the legal list remained substantially in this form until the *Trustee Investments Act, 1961*.[32] During the intervening years, the securities of new public authorities were added on an *ad hoc* basis.[33] Although the inclusion of private company securities in the English *Trustee Act, 1925* was considered, it was rejected in favour of the established policy of permitting only fixed-interest securities.[34]

The weakness of this policy began to emerge in the 1930's. As full independence came to Dominion and former Colonial territories, their securities no longer qualified under the legal list, and, as a result, the number of authorized overseas securities lessened significantly.[35] The economic consequences of the Depression also resulted in the disqualification of many other investments within the United Kingdom. After 1945, the pace of conferment of independence upon dependent territories quickened. Moreover, other factors appeared at this time that were deleterious to the legal list philosophy, namely, a sinking pound sterling, high inflation, and the conversion of commercial stock into government securities as a consequence of the nationalization of major industries, which thereafter rapidly declined in value.[36]

The economic ravages wrought by two successive world wars further beggared nations and their citizens alike. In the significant commercial recovery of the 1950's, it was common stock that provided the best hedge against inflation, and most well advised testators and settlors conferred upon their trustees considerably greater investment freedom than that authorized by the *Trustee Act, 1925*. Those trusts that were restricted to the legal list, especially charitable trusts, suffered greatly.

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[27] *Trust Investment Act, 1889*, 52 & 53 Vict., c. 2 (U.K.).

[28] *Trustee Act, 1893*, 56 & 57 Vict., c. 53 (U.K.).

[29] *Ibid.*, s. 1.

[30] *Colonial Stock Act, 1900*, 63 & 64 Vict., c. 62 (U.K.).

[31] *Trustee Act, 1925*, 15 & 16 Geo. 5, c. 19, s. 1 (U.K.).

[32] *Trustee Investments Act, 1961*, 9 & 10 Eliz. 2, c. 62 (U.K.).

[33] See, generally, Keeton, *The Law of Trusts* (9th ed., 1968), at 247 *et seq.*, and *Lewin on Trusts*, *supra*, note 25, at 322 *et seq.*, for a review of the historical development of trust investment powers in England.

[34] See Keeton, *supra*, note 33, at 250.

[35] *Ibid.*

[36] See Keeton, *The Investment and Taxation of Trust Funds* (1964), at 11. Shareholders were compelled by the government to convert their holdings into government stock at low interest rates. The stock was usually irredeemable, and it declined to about forty percent of its nominal value.

In 1952, the Nathan Committee[37] recommended to Parliament that the concept of a legal list be retained. The Committee gave no reason for this view, beyond saying that trustee investments were outside its mandate, which was solely to inquire into the law concerning charitable trusts. However, it did recommend that common stock should be included in the legal list, subject to certain qualifications. The Committee considered that not more than fifty percent of a total trust fund should be capable of investment in other than listed gilt-edged stocks,[38] and that before the debentures, stocks, and shares of a financial, industrial, or commercial company could qualify, the company must have paid at least four percent on its common shares in each year over the period of the previous ten years, and issued shares, quoted on the London Stock Exchange, to the value of at least one million pounds sterling. Moreover, the company's qualifying debentures and preference shares had to be first priority securities.

This recommendation did not receive statutory implementation, and hard-pressed trustees tied to the legal list continued to look to Parliament to add further investments to the restricted list contained in the *Trustee Act, 1925*. A partial solution to this unsatisfactory situation was provided by the *Variation of Trusts Act, 1958*,[39] which facilitates the amendment of trustees' investment powers under the trust instrument, but only if there are minor or incapacitated beneficiaries and all adult and capacitated beneficiaries consent. Otherwise, trustees had to rely on the court to confer upon them, in particular situations, an investment power found to be desirable, but not included in the trust instrument.[40] It was not until the introduction of the *Trustee Investments Act, 1961*[41] that the statutory investment power was recast.

As a result of several studies, debates, and requests for reform,[42] Parliament passed the *Trustee Investments Act, 1961*. Briefly stated, its first object was to increase the categories of investment available to trustees who had not been given a wider power of investment by the trust instrument, and its second object was to ensure that trustees would take advice from qualified persons before making investment decisions. We shall examine the specific contents of the Act in a later section of this chapter.[43]

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[37] The Committee on the Law and Practice relating to Charitable Trusts (Cmd. 8710, 1952).

[38] *Ibid.*, para. 289, at 67.

[39] 6 & 7 Eliz. 2, c. 53 (U.K.).

[40] *Trustee Act, 1925*, *supra*, note 31, s. 57(1). See, also, *infra*, this ch., sec. 3(b)(i)a.

[41] *Supra*, note 32.

[42] See, for example, the Committee on the Law and Practice relating to Charitable Trusts, *supra*, note 37, and Latham, "Trustee Investments and American Practice" (1954), 7 Curr. Legal Prob. 139, 153.

[43] See *infra*, this ch., sec. 2(b)(iii)b.

b. Canada

The development of trust investment in Canada began at a time later than the South Sea Bubble disaster in England. As a consequence, the Canadian provinces and territories adopted from the beginning the concept of the court-made list and later the legal list.

With only minor differences, the Canadian provinces and territories followed English developments in this area, gradually liberalizing the legal list. In Ontario, legislation was first enacted in 1868,[44] when Canadian federal and Ontario provincial securities were approved for trustee investment. In 1879,[45] the debentures of certain trust and loan companies were added as authorized investments, and, in 1886, a Statute Amendment Act[46] permitted trustees to invest in first mortgages, thus recognizing a long-time practice among Ontario trustees. From this time forward a series of Acts expanded the legal list.[47] In general, the character of investments authorized by the legislation of the Canadian provinces and territories was similar to that of the investments contained in the legal list in England: fixed-interest securities issued or guaranteed by federal, provincial, or municipal governments; first mortgages on land, in a gradually increasing list of provinces; and securities issued or guaranteed by the United Kingdom government. As previously noted, these investments are now contained in section 26 of the Ontario *Trustee Act*.

It was not until 1960 that Ontario added a new provision to the *Trustee Act*, now section 27, to permit trustees restricted to the legal list to invest in corporate debt obligations and preference and common shares.[48] In adding corporate securities to the legal list, the legislature was, it seems, influenced by the Uniform Trustee Act adopted in 1957 by the Conference of Commissioners on Uniformity of Legislation in Canada.[49] Responding in 1951 to criticism of the restrictive legal lists that prevailed in Canadian jurisdictions at that time, the Commissioners commenced work on a Uniform Act. Although their first draft made no reference to corporate preferred or common shares, two later drafts included such securities, with the qualification that a four percent dividend on preferred shares of qualified corporations must have been paid in each year of the five preceding years, and that a similar dividend for each year of the previous seven years must have been paid on common shares. However, the Commissioners were unable to agree upon this matter, and the final draft Act in 1957 included only the debt securities of qualifying corporations.

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[44] *An Act to Confer certain Powers on Trustees and Executors*, *supra*, note 5.

[45] *An Act respecting Investment of Trust Funds* (1879), 42 Vict., c. 21, s. 1.

[46] *The Statute Amendment Act, 1886*, 49 Vict., c.16, s. 24.

[47] *An Act amending The Trustee Investment Act* (1900), 63 Vict., c. 18, s. 1; *The Statute Law Amendment Act, 1907*, 7 Edw. 7, c. 23, s. 2; *The Trustee Act* (1911), 1 Geo. 5, c. 26, s. 27; *The Trustee Act, 1919*, S.O. 1919, c. 31, s. 2; *The Statute Law Amendment Act, 1933*, S.O. 1933, c. 59, s. 17; *The Trustee Act, 1934*, S.O. 1934, c. 60, s. 3; *The Trustee Amendment Act, 1952*, S.O. 1952, c. 109, s. 1; *The Trustee Amendment Act, 1960*, S.O. 1960, c. 126, s. 1; *The Trustee Amendment Act, 1965*, S.O. 1965, c. 134, s.1; and *The Trustee Amendment Act, 1970*, S.O. 1970, c. 39, s. 1.

[48] *The Trustee Amendment Act, 1960*, *supra*, note 47, s. 1. At that time, the consent of the Supreme Court was required for investment in the securities listed in s. 27, a requirement that was dropped in 1969: see *The Trustee Amendment Act, 1968-69*, S.O. 1968-69, c. 134, s. 1.

[49] Proceedings of the Thirty-Ninth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1957), at 24 and 82-86. It should be noted that in 1974 the Conference changed its name to the Uniform Law Conference of Canada.

In the very year of the approval of the Act, 1957, Nova Scotia enacted the Uniform Act,[50] with one important difference. The difference was that the Nova Scotia legislation followed the earlier drafts of the Commissioners and permitted trustees to invest in preferred and common shares. This statutory initiative started a trend that spread across Canada. In 1960, as we have seen, Ontario enacted section 27 of the *Trustee Act* to allow investment in corporate debentures, preferred and common shares,[51] provided that the consent of the Supreme Court had been obtained on application by trustees wishing to invest in this manner. During the period between 1957 and 1970, one Canadian jurisdiction after another amended its trustee legislation to permit investment in corporate securities.[52] In 1969, Ontario dropped the requirement of judicial consent.[53]

In 1965, the Conference of Commissioners on Uniformity of Legislation in Canada returned to the subject of trustee investment in view of the fact that most provincial trustee legislation had gone beyond the 1957 Uniform Act.[54] In 1970, a new Uniform Act was adopted that departed entirely from the concept of the legal list.[55] This Act proposed a new investment power, namely, the prudent man concept, an approach that will be discussed in greater detail in a later section of this chapter.[56]

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[50] *Trustee Amendment Act*, S.N.S. 1957, c. 54.

[51] Ontario adopted a varied form of the drafts of the Uniformity Commissioners that had specified the dividends and the length of time prior to an investment that the dividend must have been paid. For investment in preference shares, Ontario required only a dividend at the set rate on all the issued preference shares and adopted the period of five previous years; it required as an alternative a four percent dividend on all the company's issued common shares, but required only a previous five years of such payment. For investment in common shares, Ontario adopted the Commissioners' earlier drafts – four percent on all its common shares over the preceding seven years.

It is also a possible explanation of its actions that in 1960 Ontario simply followed the then formulae for authorized investments contained in Part III of the *Canadian and British Insurance Companies Act*, S.C. 1932, c. 46, s. 63(*b*)(ii), (iii), and (v), then enacted as R.S.C. 1952, c. 31, s. 63(1)(*j*), (*k*), and (*l*). The latter Act was later amended (S.C. 1964-65, c. 40, s. 5(5)) to permit investment in common shares, if the qualifying company had paid a four percent dividend in each of the preceding *five* years, or had earnings in each such year available to pay such a dividend.

[52] For a comprehensive summary of those Canadian jurisdictions that permit trustee investment in corporate securities, see Waters, *supra*, note 8, at 987-95.

[53] *The Trustee Amendment Act, 1968-69*, *supra*, note 48, s. 1.

[54] Proceedings of the Forty-Seventh Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1965), at 31.

[55] Uniform Trustee Act, Proceedings of the Fifty-Second Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1970), at 35 and 115-17.

[56] See *infra*, this ch., sec. 2(c)(ii)b.

(iii) The Legal List Today

a. Canada

Today, eight provinces possess in their trustee legislation a list of permitted investments.[57] New Brunswick and Manitoba,[58] the Northwest Territories,[59] and the Yukon[60] are the exceptions, and instead have adopted the investment power proposed in 1970 by the Conference of Commissioners on Uniformity of Legislation in Canada, namely, the prudent man concept. Of the jurisdictions that retain a legal list approach to trustee investments, we have already examined in detail the provisions that are contained in the present Ontario *Trustee Act*.[61] The remaining jurisdictions follow, in substance, the Ontario pattern. However, they differ from Ontario in that there is no complete matching of authorized investments, nor of qualifying conditions. For example, Newfoundland does not permit investment in corporate preferred shares, and, together with Saskatchewan, does not permit investment in common shares. All of the legal list jurisdictions place restrictions upon the percentage of trust funds that may be invested in a particular range of investment, but differ both as to the securities that are included within the percentage and as to the level of percentage prescribed.[62]

Finally, it should be noted that legislation, other than trustee legislation, employs a legal list concept for investment purposes. An example of such a list is contained in the federal *Canadian and British Insurance Companies Act*,[63] designed for the investment of the funds of life and other insurance companies. It is interesting to note that in private trusts the investment power of trustees is frequently expressed by reference to this Act. However, in such cases of incorporation by reference, the Act's percentage limitation, which brings about diversification within the authorized list, is usually made expressly inapplicable by the trust instrument.

b. England

It will be recalled that in 1961 England recast the statutory investment power with the enactment of the *Trustee Investments Act, 1961*.[64] The Act, which constitutes the statutory investment power for trustees in England today, was intended to confer upon trustees a wider power of investment than had previously existed and to ensure that trustees sought advice from investment experts before investing in a particular security.

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[57] See Waters, *supra*, note 8, at 987-95, for a comparative survey of the investment powers under the investment sections of the provincial Trustee Acts.

[58] See, respectively, the *Trustees Act*, R.S.N.B. 1973, c. T-15, s. 2, and *An Act to Amend The Trustee Act*, *infra*, note 182. For a discussion of the recent Manitoba legislation, see *infra*, sec. 2(c)(ii)b.

[59] *Trustee Ordinance*, R.O.N.W.T. 1974, c. T-8, s.3.

[60] *Trustee Ordinance*, R.O.Y.T. 1978, c. T-5, ss.3 and 4, as am. by O.Y.T. 1980 (1st), c. 33, s. 1(1).

[61] See *supra*, this ch., sec. 2(b)(i).

[62] See Waters, *supra*, note 8, at 993-95.

[63] R.S.C. 1970, c. I-15, s. 63.

[64] *Trustee Investments Act, 1961*, *supra*, note 32.

To secure the first objective, the Act classifies investments into narrower-range and wider-range investments.[65] Narrower-range investments are divided into two lists. The first, Part I investments, consists of various kinds of savings bonds and savings accounts.[66] The second, Part II investments, contains the investments that were authorized by the *Trustee Act, 1925*, with some additions of a similar nature.[67] The wider-range investments, Part III investments, consist of debentures, stocks, and shares issued in the United Kingdom, including the common stock and shares of financial, industrial, and commercial companies registered in the United Kingdom.[68] A qualifying company must have at least one million pounds sterling of issued and paid-up capital and have paid a dividend on all its shares in each of the five years previous to the investment,[69] although the Act does not state that the dividends must satisfy any particular percentage requirement. Also included in Part III, the wider-range investments, are unit trusts and shares in designated building societies.

A trustee may invest up to fifty percent of the trust assets in Part III, wider-range, investments. Specifically, section 2(1) of the Act provides that a trustee who wishes to invest in wider-range securities must first divide the total fund into two equal parts. Thereafter, for investment purposes, the two halves must be kept completely distinct, one half being invested in the narrower-range investments and the other half being invested in the wider-range investments. Although subsequent accruals to either portion may remain in that half, any transfer of investments from one half to the other must be accompanied by an equivalent value transfer in the reverse direction. New funds coming to trustees may always be invested entirely in the narrower-range investments, but only one half of such funds may be invested in the wider-range investments. The powers contained in the Act are in addition to and not in derogation from any other investment powers conferred upon trustees by the trust instrument, or otherwise by statute, or by a court order.[70] The Act contains complex provisions to deal with these other investment powers that trustees might possess. These powers are known under the Act as "special powers", and property acquired pursuant to such powers is designated "special-range property".[71]

The second objective of the *Trustee Investments Act, 1961*, namely, to ensure that trustees act only upon proper advice, is secured by prescribing the investment considerations that trustees are to entertain, and when they must seek advice.[72] Trustees are to consider the types of investment they should acquire and the suitability of the proposed investment to the needs of their particular trust.[73] The relevant provisions seem to do no more than specify the common law duty of care. Quite new to English trustee legislation, however, is the requirement that trustees shall have regard to the need for diversification of investments of the trust, "in so far as is appropriate to the circumstances of the trust".[74] As a result, it would appear that trustees operating under the Act can no longer invest heavily in one or two authorized investments, such as narrower-range investments, and, to a charge that they have permitted the value of the portfolio to fall substantially, later raise the defence that the investments are statutorily authorized.

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[65] *Ibid.*, s. 1(4). See, also, Pettit, *Equity and the Law of Trusts* (4th ed., 1979), at 277-90, for a detailed examination of the English trustee investment powers.

[66] *Trustee Investments Act, 1961*, *supra*, note 32, Schedule 1, Part I.

[67] *Ibid.*, Schedule 1, Part II.

[68] *Ibid.*, Schedule 1, Part III.

[69] *Ibid.*, Schedule 1, Part IV.

[70] *Ibid.*, s. 3(1).

[71] *Ibid.*, s. 3(3), Schedule II, para. 1. See, also, Pettit, *supra*, note 65, at 279-80.

The Act further stipulates that trustees who plan to invest in Part II and Part III investments must first seek advice in writing from a person they reasonably believe "to be qualified by his ability in and practical experience of financial matters".[75] Moreover, after the initial investment, before any selling or further purchase may take place, trustees must again seek advice. In either case, advice is not required by the Act if one of the trustees is qualified in investment matters.[76] The loan of trust money on the security of real estate requires the additional advice of a valuator or appraiser,[77] so that a trustee who contemplates such an investment needs preliminary advice from two quarters, an investment adviser and a valuator or appraiser.

It should be noted that the *Trustee Investments Act, 1961* permits the addition of new investments to the legal list by Order-in-Council, instead of by statutory amendment,[78] and that by a statutory order of the Treasury the fifty percent maximum investment in the wider-range investments can be adjusted as prevailing circumstances require.[79]

In 1982, the English Law Reform Committee published its *Report on the Powers and Duties of Trustees*.[80] One of the matters that was examined was the *Trustee Investments Act, 1961*. The Law Reform Committee concluded that the statutory powers contained in the Act were out of date and should be revised.[81] In arriving at this conclusion, the Committee noted that, in the "vast majority of cases the Act is either modified or wholly excluded in the trust instrument", as it has "proved to be tiresome, cumbrous and expensive in operation".[82] The English Law Reform Committee considered several approaches to reform.

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[72] *Trustee Investments Act, 1961*, *supra*, note 32, s. 6.

[73] *Ibid.*, s. 6(1)(b).

[74] *Ibid.*, s. 6(1)(a).

[75] *Ibid.*, s. 6(2) and (4). However, having sought expert advice, trustees are not obliged to follow it. They must only "obtain and consider proper advice".

[76] *Ibid.*, s. 6(3) and (6).

[77] *Trustee Act, 1925*, *supra*, note 31, s. 8 (U.K.).

[78] *Supra*, note 32, s. 12.

[79] *Ibid.*, s. 13.

[80] Law Reform Committee, *Twenty-third Report: The Powers and Duties of Trustees* (October, 1982) (hereinafter referred to as "English Law Reform Committee Report").

[81] *Ibid.*, at 16.

The Committee considered, but rejected, making minor alterations to the proportions of trust assets that could be invested in narrower-range and wider-range investments, on the basis that such changes would not protect the trust assets from inflation in the long term.[83] The Committee also reviewed the possibility of removing all restrictions on the power of investment, or, at a minimum, limiting the power to invest only by broad discretionary principles such as the duty to maintain a proper balance between income and capital and the duty to ensure that the risk involved in investment is sufficiently diversified.[84] While the Committee acknowledged that "a general freedom to invest within the framework of . . . a duty of care has its attractions and might reflect current practice",[85] it was of the view that "such a solution would create considerable difficulties particularly for smaller trust funds".[86] Generally speaking, the Committee favoured an approach whereby the law would provide guidance and protection for trustees. The Committee was of the opinion that trustees should be required "to exercise all due care and skill and that this duty would be fulfilled either by investment in a scheduled list of 'safe' investments or by taking professional advice".[87]

The English Law Reform Committee therefore recommended the repeal of the *Trustee Investments Act, 1961* and set forth ten new powers that should govern the power of investment by trustees. In particular, the Committee recommended that investments should be divided into those that could be made without advice and those that could be made only with advice; the former category would be the present narrower-range investments and the latter category would consist of any other investments.[88] In the Committee's view, trustees should be free to invest in such proportions as they choose, subject to an express statutory duty to maintain a balance between income and capital and the need for diversification.[89] The Committee recommended that the provisions contained in the present Act concerning advice should be retained.[90] In addition, the Committee was of the view that trustees should continue to be able to apply to the court under section 57 of the *Trustee Act, 1925* to make otherwise unauthorized investments, and that trustees should be entitled to make an application under the *Variation of Trusts Act, 1958* for a widening of their investment powers generally under the trust instrument.[91]

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[82] *Ibid.*

[83] *Ibid.*

[84] *Ibid.*

[85] *Ibid.*

[86] *Ibid.*, at 17.

[87] *Ibid.*

[88] *Ibid.*, at 63.

[89] *Ibid.*

[90] *Ibid.*

[91] *Ibid.*, at 63-64.

c. *Australia and New Zealand*

Like Canadian common law jurisdictions, the Australian states and New Zealand have traditionally followed English trustee legislation, and have generally adopted English case law in the area of trustee investment powers. As a consequence, each of the Australian jurisdictions introduced at the inception of its trustee legislation a legal list of fixed-interest securities that, for the most part, took the form of the debt securities of public authorities. To a greater or lesser extent, this policy has prevailed to the present day. Indeed, as late as 1976, Tasmania adopted a newly composed list of trustee investments that makes no mention of securities of corporate business enterprises.[92]

The effect of inflation has been as relentless in Australia and New Zealand as elsewhere. Consequently, trustees of family and charitable trusts, restricted to statutory legal lists, have sought to escape from inflationary pressures by applying to the courts for authorization to invest in common shares of corporations.[93] Although these applications have met with some success,[94] there is no reason to suggest that the Australian jurisdictions or New Zealand are thinking in terms of abandoning the legal list policy of investment. Recent legislation in Western Australia[95] and in New Zealand[96] has done no more than follow the pattern, familiar in both Canada and England, of adding to the legal list debentures and preferred and common shares.

In 1962 Western Australia enacted the *Trustees Act, 1962*.[97] The investment power contained in this legislation is modelled upon several principal features of the English *Trustee Investments Act, 1961*. The concept of the legal list is retained in the Act, and the categories of authorized investments include preferred shares, debentures, stocks and bonds, corporate deposit arrangements or notes, as well as common shares of corporations.[98] In order for the securities of a corporation to qualify as investments under the Act, the company must be incorporated in Australia, its shares must have been issued and registered in Australia, the prices of qualifying shares and debentures must be quoted on an Australian stock exchange, and all shares must be fully paid up, or, under the terms of the issue, be fully paid up within nine months of issue.[99] Further, no corporation qualifies unless it has a share capital of not less than one million pounds, and has paid a dividend on all its common stock and shares in each year of the fifteen years immediately preceding the investment.[100] It will be observed that, while the number of years of dividend payment is much longer than the five years prescribed by the English *Trustee Investments Act, 1961*, both the English Act and the Western Australia Act follow the policy of abandoning the percentage dividend requirement.[101]

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[92] *Trustee Act 1976*, Tasm. Stat. 1976, No. 55.

[93] See Meagher and Gummow, *Jacobs' Law of Trusts in Australia* (4th ed., 1977), at 306-08.

[94] Commenting upon one such successful application in *National Trustees Executors & Agency Co. of Australasia Ltd. v. A.G. of Victoria*, [1973] V.R. 610 (S.C.), Griffith, in "Trusts and Trustees – Enlargement of Investment Powers – Guarding Against Inflation" (1973), 47 A.L.J. 610, at 611, concluded:

> The law which defines the investment powers of trustees is long overdue for reform; and it is something of a scandal that steps have not been taken to amend the *Trustee Act* in Victoria (as there have been, for example, in Western Australia) so as to avoid the very substantial expense of making applications for enlargement of powers in cases where no special or unusual powers are sought.

[95] *Trustees Act, 1962*, W. Austl. Acts 1962, No. 78.

[96] *Trustee Amendment Act, 1974*, Stat. N.Z. 1974, No. 15.

[97] *Supra*, note 95.

[98] *Ibid.*, s. 16(1). Unit trusts are also included as authorized investments by s. 16(1)(n).

The Western Australia Act adopts the approach taken in the English Act of setting out the duties of trustees in selecting investments.[102] As in the English Act, trustees must consider diversification and the suitability of each investment that they contemplate.[103] Accordingly, they must seek advice from qualified persons, unless one of their number possesses the required skills.[104] Moreover, certain matters that would otherwise be within the trustees' discretion and the general case law duty of care are translated into specific duties in the Western Australia Act. For example, there are provisions concerning the purchase of stocks redeemable at a premium or discount, investment in bearer securities, the loan of trust funds on the security of real estate, and the release of part of that security.[105]

A substantial difference exists, however, between the structure of the investment power in the Western Australia Act and in the English Act, which marks a significant development in legal list philosophy. Unlike the English Act, the Western Australia Act does not classify the permitted investments into narrower-range and wider-range investments. In fact, the Act makes no division of legal list investments, and imposes no percentage maximum on the amount of the fund that may be invested in corporate securities. The thinking of the Western Australia Parliament appears to be that the diversification and choice requirements, together with the advice requirement, are sufficient safeguards to secure wise investment. To prevent speculative investment in corporate securities, the Act relies upon the qualifications, referred to previously, that corporations must satisfy before their securities may become authorized investments.

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[99] *Ibid.*, s. 16(3). In 1968, the problems of the small trust fund were met when amending legislation permitted trustees to invest in the common trust funds of trust companies: see *Trustees Act Amendment Act, 1968*, W. Austl. Acts 1968, No. 18, s. 2(c).

[100] *Trustees Act, 1962*, *supra*, note 95, s. 16(4). This figure is now expressed in Australian dollars.

[101] It will be recalled that under the Ontario *Trustee Act*, *supra*, note 6, s. 27(1)(*d*)(ii), a dividend of at least four percent must have been paid for each year of the five years preceding any investment by the trustees.

[102] *Trustees Act, 1962*, *supra*, note 95, s. 16(5), and *Trustee Investments Act, 1961*, *supra*, note 32, s. 6.

[103] *Trustees Act, 1962*, *supra*, note 95, s. 16(5).

[104] *Ibid.*

[105] *Ibid.*, ss. 18, 21, and 24.

The Law Reform Commission of Western Australia has recently published a *Working Paper on Trustees' Powers of Investment*.[106] The Commission had been asked to consider whether the range of authorized trustee investments should be expanded, in view of comments that these investments were "inadequate in the prevailing economic circumstances" and that "trustees [should] be given further powers of investment to enable them to take advantage of certain new forms of investment now available".[107] In the Working Paper, the Commission canvassed the arguments for and against the list approach and the prudent man rule. On the one hand, the Commission noted that the prudent man rule would allow "trustees far greater flexibility to respond to changing economic circumstances which would assist in protecting the trust estate",[108] and would mean that an "honest and diligent trustee who made prudent investments in good faith would be less likely to commit technical breaches of the trust by accident".[109] On the other hand, the Commission was concerned that wide powers of investment "may not provide sufficient guidance to inexperienced trustees".[110] The Commission also noted that no other jurisdiction in Australia has conferred a general power of investment on trustees. Accordingly, the Commission has invited comment on this issue.[111] While emphasizing that it has not formulated a final conclusion, the Commission states that "it is tentatively of the view that the present list approach to authorized investments should be preserved although perhaps in an expanded form".[112]

In New Zealand, the Property Law and Equity Reform Committee reported on *Trustees' Statutory Powers of Investment* in 1970.[113] The Committee was unanimously of the view that, as between the American "prudent man rule",[114] the English *Trustee Investments Act, 1961*, and the Western Australian *Trustees Act, 1962*, the last was the approach that New Zealand should adopt in reforming its legal list. The Committee was of the opinion that the prudent man rule "offered too little guidance to trustees who [are] not experienced in investing money",[115] and that the English Act was too restrictive and unnecessarily complicated.[116] On the other hand, the Committee felt that the Western Australia approach "provided flexibility while at the same time laying down guidelines which, if followed, would exempt a trustee from liability for any loss".[117]

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[106] Law Reform Commission of Western Australia, *Working Paper on Trustees' Powers of Investment* (Project No. 34 - Part V, 1981) (hereinafter referred to as "Western Australia Working Paper").

[107] *Ibid.*, at 5.

[108] *Ibid.*, at 41.

[109] *Ibid.*

[110] *Ibid.*

[111] In this regard, the Law Reform Commission of Western Australia also published a *Questionnaire on Trustees' Powers of Investment* to accompany the Working Paper. The questionnaire, consisting of 19 multi-part questions, relates to the tentative proposals that are set out in the Working Paper.

[112] Western Australia Working Paper, *supra*, note 106, at 42.

[113] New Zealand Property Law and Equity Reform Committee, *Trustees' Statutory Powers of Investment* (1970) (hereinafter referred to as "New Zealand Report"). For a comment on the Report, see Burgess, "*Trustee Investments and Inflation*", [1971] N.Z.L.J. 497.

[114] See *infra*, this ch., secs. 2(c)(i) and 2(c)(ii)a.

[115] New Zealand Report, *supra*, note 113, at 5, para. 11.

The Committee's reasoning is worth noting.[118] Although the Committee members realized that the common practice was for trust instruments to give trustees wide powers of investment, often accompanied by an exoneration clause absolving trustees from liability for loss occasioned by the use of these powers, they considered that the statutory adoption of such a policy would provide an insufficient safeguard against abuse. However, the Committee pointed out that wide powers, whether conferred by the instrument or by statute, do not affect trustees' overall duties: trustees remain subject to the duties to keep an even hand between successive beneficiaries and to act with care and diligence. The inference that may be drawn from the Report is that the Committee believed that the Western Australia approach imposes a useful measure of protection by listing authorized investments and by specifying the rules of conduct trustees should follow.[119] It is interesting to note that, although the Committee recommended the adoption of the requirements that trustees obtain advice and consider the suitability of investments,[120] it rejected placing in statutory form a requirement of diversification of investments.[121] The reason advanced was that "in some cases diversification might be unwarranted and even unsuitable", and that a trustee "is, in any event, under a general duty to act prudently".[122]

The New Zealand Parliament enacted the Committee's recommendations in the *Trustee Amendment Act, 1974*,[123] with certain variations. The Committee, for example, had recommended that the securities of a company, whether or not incorporated in New Zealand, should qualify if the company possessed a paid-up share capital of at least one million New Zealand dollars.[124] It had originally favoured confining investment to companies that were incorporated in New Zealand and that had a paid-up capital of two million dollars, but rejected this proposal as there were, at that time, only fifty-eight companies that would have qualified.[125] Parliament, however, increased the paid-up share capital requirement to two and a half million dollars, and further stipulated that the capital must have been paid up in the three years preceding the investment.[126] Moreover, the Act requires incorporation in New Zealand in order for a company's securities to qualify as authorized investments.[127]

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[116] *Ibid.* The reason given for this conclusion was that the trust fund has to be divided into two equal halves. It is not clear from the New Zealand Report whether this is an objection to a percentage rule, or also an objection to the devices of the 1961 Act, such as equalizing cross-transfers, aimed at maintaining the division. It seems to be the former.

[117] *Ibid.*

[118] *Ibid.*, at 6, para. 13.

[119] *Trustees Act, 1962*, *supra*, note 95, s. 16(5).

[120] New Zealand Report, *supra*, note 113, at 9, para. 21, and Draft of Proposed Trustee Amendment Bill, s. 3(1D).

[121] New Zealand Report, *supra*, note 113, at 10, para. 22. This recommendation is contrary to the English and Western Australia approach, which requires trustees to have regard to the need for diversification of investments of the trust, where appropriate: see *Trustee Investments Act, 1961*, *supra*, note 32, s. 6(1)(a), and *Trustees Act, 1962*, *supra*, note 95, s. 16(5).

[122] New Zealand Report, *supra*, note 113, at 10, para. 22.

[123] *Trustee Amendment Act, 1974*, *supra*, note 96.

[124] New Zealand Report, *supra*, note 113, at 6-7, para. 14, and Draft of Proposed Trustee Amendment Bill, s. 3(1A)(a) and (1C)(a).

Although the New Zealand Act is in many respects similar to the Western Australia Act, certain significant differences do exist. Like the Western Australia Act, the New Zealand Act places no explicit restriction on the percentage of the trust fund that may be invested in common shares or other corporate securities. Rather, the Act relies upon the imposition on companies of the above-noted qualifications that must be satisfied before their securities may be authorized as investments, and upon the general common law duties and specific statutory duties imposed upon trustees. However, unlike the Western Australia Act, the New Zealand Act adopted the Committee's proposal not to make diversification a statutory rule of law.[128] Further, unlike the English and Western Australia Acts, the New Zealand Act retains a percentage requirement for dividends: a company must have paid a dividend of at least five percent on all its issued shares in each of the five years immediately preceding the investment.[129]

d. United States

As will be discussed in greater detail later in this chapter,[130] certain American jurisdictions adopted, at the beginning of the twentieth century, statutory legal lists of authorized investments. Some of the jurisdictions still retain the legal list approach to trustee investment, and, at this point, it may be useful to outline the form of the legal list that exists today in the United States.

In respect of legal lists, there is no uniformity in the American scene. In the Canadian and Commonwealth tradition, some American jurisdictions adhere to a mandatory legal list that permits investment outside the list only if the trust instrument so authorizes.[131] However, other American jurisdictions have adopted a permissive legal list philosophy, which, by statute, allows trustees to invest outside the list. Virginia[132] and New Jersey,[133] among others,[134] are examples of jurisdictions that utilize a permissive legal list for trustee investment. These jurisdictions retain the legal list, but statutorily permit investment of a certain percentage of the trust fund in corporate stocks on the basis of the prudent man rule.[135] Such an approach recognizes that the case law duty of care, skill, and caution requires trustees to consider the suitability of each investment and probably the need to diversify investment.[136] Trustees, in exercising the investment power, are thus given a measure of discretionary authority, while, on the other hand, a measure of control is imposed by the limitation on the extent to which the prudent man approach may be employed.

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[125] New Zealand Report, *supra*, note 113, at 7, para. 14.

[126] *Trustee Amendment Act, 1974*, *supra*, note 96, s. 3.

[127] *Ibid.*

[128] New Zealand Report, *supra*, note 113, at 10, para. 22.

[129] *Ibid.*, at 7, para. 16, and *Trustee Amendment Act, 1974*, *supra*, note 96, s. 3. Other differences include the exclusion of unit trusts by the New Zealand Act, adopting the position of the New Zealand Report that such trusts are not necessarily limited to authorized investments: see New Zealand Report, *supra*, note 113, at 9, para. 20. Also, if shares are not already paid up, the New Zealand Act specifies that corporate shares must, by the terms of the issue, be fully paid up within 12 months, rather than the 9 month requirement in the Western Australia Act: see New Zealand Report, *supra*, note 113, at 7, para. 16; *Trustee Amendment Act, 1974*, *supra*, note 96, s. 3; and *Trustees Act, 1962*, *supra*, note 95, s. 16(3)(b).

[130] See *infra*, this ch., sec. 2(c)(i).

[131] See, for example, Alabama Code 1940, tit. 58, § 47.

(c) THE PRUDENT MAN RULE

The prudent man rule is, in essence, a statement of the common law general duty of care and skill required of trustees in the discharge of all their tasks on behalf of the trust and its beneficiaries. In the absence of the legal list, the general duty of care remains.[137]

(i) History of the Rule

In England, the investment duty of a trustee prior to the collapse of the South Sea Company was to act as a prudent man. However, the South Sea Bubble and the resultant court-made list occurred early in the history of the trust, and it is probably the case that the general duty of care was not as clearly formulated then as it is today. Therefore, it may be said that from early days the legal list effectively constituted the investment duty of trustees. Indeed, it may be for this reason that in many legal list jurisdictions it is presumed, even today, that trustees will be protected automatically from liability for negligence if the trust funds are placed in authorized legal list investments.[138]

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[132] Va. Code 1950, §§ 26-40 to 26-45, as am. L. 1956, c. 83.

[133] N.J. Stats. Ann., § 3A: 15-18 to 15-29.

[134] See, also, Georgia Code Ann., §§ 108-417 to 108-421; Kentucky Rev. Stats. 1962, § 386.020; Ohio Rev. Code, tit. 21, § 2109.37; and Tennessee Code Ann., §§ 35-302 to 35-318, as am. Tenn. L. 1951, c. 125.

[135] See *infra*, this ch., sec. 2(c)(ii)a.

[136] See, for example, *Appeal of Dickinson*, 25 N.E. 99 (Mass. Sup. Jud. Ct. 1890), and *In re Mueller's Trust*, 135 N.W.2d 854 (Wis. Sup. Ct. 1965).

[137] See Waters, *supra*, note 8, at 685-90, for an analysis of the common law standard of care required of trustees in relation to the investment of trust funds.

[138] The relevance of the general duty of care to a legal list investment power has always confused trustees and their advisers. The English and Western Australia Acts attempt to deal with the problem by setting out the more specific duties of trustees to seek advice concerning the suitability of investments and the need for diversification of investment, while the New Zealand Act only sets out the advice and suitability requirements. There would seem to be something more that the investing trustee has to do than choose at random a legal list investment. However, there appears to be a lack of consensus on this important point. See, also, Pettit, *supra*, note 65, at 280-81.

After the collapse of the South Sea Company, an adequate supply of non-commercial investments made a legal list viable in England. But the same situation did not exist in Massachusetts in the early part of the nineteenth century. Moreover, a thriving economy made commercial investments doubly attractive. Largely for these reasons, the Massachusetts rule, or "prudent man" rule, was first formulated by Justice Putnam in 1830 in *Harvard College v. Amory*.[139] His words, which in one form or another were ultimately to become the investment duty throughout many jurisdictions of the United States, were as follows:[140]

> All that can be required of a trustee to invest, is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested.

The prudent man rule, as formulated by the *Amory* case, contemplated that if trustees invested trust assets with the prudence, discretion, and intelligence that ordinary businessmen would employ in the management of their own affairs, the exercise of the investment power by the trustees would be considered proper. The prudent man, as defined by Justice Putnam, would not speculate, but would have regard to the permanent disposition of the trust funds considering both the probable income and the probable safety of the capital.

In subsequent decisions, however, it occurred to some courts that there was a manner in which a trustee ought to invest, as opposed to how an ordinary businessman would invest. One of the earliest formulations of this principle is to be found in *King v. Talbot*[141] in 1869, where Justice Woodruff, after referring to the *Amory* case, announced the so-called "New York" rule, or "prudent trustee" rule.[142] The judicial decisions that thereafter propounded this "prudent trustee" rule appeared to draw a distinction between the prudence expected in investment matters of a trustee, as opposed to that expected of an ordinary businessman, based upon the assumption that an ordinary prudent man might sometimes take chances in making an investment that a prudent trustee would not take.[143] A classic statement of this rule is set forth in *In re Buhl's Estate*, where Sharp J. stated as follows:[144]

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[139] *Harvard College v. Amory*, 9 Pick. 446 (Mass. Sup. Jud. Ct. 1830).

[140] *Ibid.*, at 461. See, further, Scott, *The Law of Trusts* (3d ed., 1967), §§ 227-31, at 1805-85.

[141] 40 N.Y. 76 (Ct. App. 1869).

[142] Woodruff J., *ibid.*, at 85-86, stated the "prudent trustee" rule as follows:

> [T]he just and true rule is, that the trustee is bound to employ such diligence and prudence in the care and management, as in general, prudent men of discretion and intelligence in such matters, employ in their own like affairs.

As Scott, *supra*, note 140, § 227.5, at 1814, points out, while "[a]t first blush it would appear that the rule applied [in Massachusetts and New York] is the same, [a]s a matter of fact, . . . the New York courts have been far more strict in the application of the rule than have the Massachusetts courts".

[143] See, further, Scott, *supra*, note 140, § 227.5, at 1813-15.

[144] *In re Buhl's Estate*, 178 N.W. 651 (Mich. Sup. Ct. 1920), at 654.

> A trustee has not unlimited authority to invest as an ordinary prudent man would invest his own; he must take such risks only as an ordinary prudent man would take who is a trustee of the money of others.

The "prudent trustee" formulation emerged at a time when there was available to trustees an adequate supply of public authority securities and sound mortgages. Further, failures in private ventures, such as railroads and banks, and the destruction of many private enterprise securities during the Civil War, encouraged the view that the securities of private companies were not suitable investments for trustees. Moreover, as trustees were often members of the family of the creator of the trust, it was the view that these persons should be guided by a conservative investment position. Consequently, in the second half of the nineteenth century, a number of American jurisdictions[145] followed the example of New York and adopted a more cautious and conservative approach in the area of trustee investment powers. These jurisdictions exhibited a tendency to rely upon precedent concerning the appropriateness of a security for trustee investment, a process that resulted in the formulation of court-made lists.

As the above discussion indicates, until the beginning of the twentieth century, except for those few states that had judicially adopted the prudent man rule,[146] investments were defined and gradually collected in court-made lists. However, due to the often inflexible and restrictive nature of court-made lists, legislation intervened and statutory legal lists began to appear.[147] These statutory legal lists usually permitted investment in sound corporate bonds, in addition to federal and state issues, but investment in corporate equities, except for specified bank and utility stock, was prohibited. The fiduciary investment statutes were subject to frequent amendment in order to accommodate specific businesses, such as railways and utilities, or to promote a particular industry for economic reasons. The result was a national patchwork quilt of trustee investment lists intended to provide trustees with safe investments.

The stock market crash of 1929 revealed that many of the safe investments on these statutory lists were clearly unsafe. There followed a realization that the statutory lists no longer provided an appropriate guide for trustee investments and were, in addition, unjustifiably restrictive. With the emergence of a new financial scene after 1933, pressure mounted, not for wider lists, but for trustees to have the right to choose the best investments for their particular trust.[148] Up to this time, only five states had adopted the prudent man rule as formulated in the *Amory* case.[149] However, as a result of the economic upheaval and the fact that high grade common stocks were yielding at least twice as much as good bonds, various states enacted by statute the prudent man concept of investment in one form or another. Michigan, for example, chose to codify the "prudent trustee" formulation of the concept in 1937,[150] and was followed by Minnesota in 1943.[151] On the other hand, Missouri judicially adopted the "prudent man" statement in 1940.[152]

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[145] Several state constitutions prohibited the legislature from passing laws to authorize fiduciaries to invest in the securities of private corporations: see, for example, Pennsylvania, Pa. Constit. (1873), Art. III, § 22, as am. in 1933. The Alabama and Montana constitutions still retain this prohibition: see Ala. Constit. (1901), Art. IV, § 74, as am. in 1939; Mont. Constit. Art. V, § 37.

[146] Massachusetts formulated the prudent man rule in 1830 in *Harvard College v. Amory*, *supra*, note 139, and the rule was adopted by Maryland in 1884 in *McCoy v. Horwitz*, 62 Md. 183 (Ct. App. 1884); in Rhode Island in 1886 in *Peckham v. Newton*, 4 A. 758 (R.I. Sup. Ct. 1886); and in Vermont in 1908 in *Scoville v. Brock*, 70 A. 1014 (Vt. Sup. Ct. 1908).

[147] For a commentary on the inception of the statutory legal list, see Friedman, "The Dynastic Trust" (1963-64), 73 Yale L.J. 547, at 563 *et seq*.

Meanwhile, the Trust Division of the American Bankers Association adopted, in 1942, a Model Prudent Man Investment Act,[153] which reflects the "prudent man" formulation. Section 1 of the Model Act provides, in part, as follows:

> *Section 1*. In acquiring, investing, reinvesting, exchanging, retaining, selling and managing property for the benefit of another, a fiduciary shall exercise the judgment and care under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital.

From 1943, when California[154] and Delaware[155] enacted the Model Act, to the present, twenty-eight jurisdictions have passed legislation based in whole or in part upon this model.

(ii) The Prudent Man Rule Today

a. United States

Today, the total number of jurisdictions in the United States that have adopted some form of a prudent man concept for the trustee investment power is forty-two.[156] It is true that not all states have adopted the rule in the same form; some have preferred the prudent trustee formulation to the prudent man statement, while others have limited the full effect of the rule in one way or another.[157] Nevertheless, the fact that more than four-fifths of the jurisdictions in the United States have moved toward a prudent man concept is a definite indication that the legal list philosophy has failed to meet the requirements of the constantly changing field of possible trustee investments, in which flexibility is essential to proper management of a trust portfolio. Because of inflation and high tax, it was felt that trustees needed the power to adjust the balance between their fixed-interest securities and their growth stock as circumstances required, without waiting for legislative amendments or regulatory permission. The stability of markets dealing in modern securities, the sounder structures of contemporary corporate management and financing, and the development of mutual funds and common trust funds all played their part in producing overwhelming support for the adoption of the prudent man concept in the various jurisdictions of the United States.

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[148] See Jennett, "Changing Concepts of Trust Investments" (1955), 94 Trusts & Es. 843, at 844.

[149] *Supra*, note 139. North Carolina judicially adopted the prudent man rule in 1928 in *Sheets v. J.G. Flynt Tobacco Co.*, 141 S.E. 355 (N.C. Sup. Ct. 1928).

[150] Michigan codified the rule as enunciated *In re Buhl's Estate*, *supra*, note 144. See, now, Mich. Comp. L. 1967, § 555.201.

[151] Minn. L. 1943, c. 635.

[152] *Rand v. McKittrick*, 142 S.W.2d 29 (Mo. Sup. Ct. 1940).

[153] Prudent Man Investment Act, Trust and Estate Legislation, published by the Division, and reproduced in Proceedings of the Forty-Ninth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1967), at 223-24.

[154] Cal. Civ. Code, § 2261 (West), as am. by 1943 Cal. Stat., c. 811.

[155] Del. Code Ann., tit. 12, § 3302, added by Del. Laws 1943, § 171, as am. by Del. Laws 1947, c.268.

[156] See Scott, *supra*, note 140, § 227.13, at 1841-42, *n*. 1, for a list of the state statutes governing trust investments.

Over the past forty years, considerable literature has been published in the United States on the operation of the prudent man concept in a wide range of investment situations, especially in terms of the obligations that the various formulations of the concept impose upon trustees.[158] Without analyzing the finer distinctions and limitations upon the concept that have been adopted by certain jurisdictions, in general terms, it may be said that the standard of care, skill, and caution required by a trustee is that of the ordinary man of business.[159] Insofar as this rule is a statement of a trustee's overall duty of care, couched in an investment context, it is sufficient at this point if we merely allude to the investment duties that the rule involves.

Trustees' investment duties cover a wide range of activities. As previously noted, the Model Prudent Man Investment Act specifies these activities as "acquiring, investing, reinvesting, exchanging, retaining, selling and managing".[160] A trustee must ensure that in his investment selections there is no conflict between his duty to the trust and his own personal interests. He may employ advisers, but the ultimate investment decisions cannot be delegated. So far as one can generalize, a trustee investing as a prudent man would avoid unproductive property, real estate outside the jurisdiction, unsecured loans, and investment in unincorporated businesses, as well as in temporary, high-risk, and wasting assets. Although the security may be sound, second mortgages would commonly be avoided, because the trustee loses control of the investment: the first mortgagee may foreclose, and the trustee may not have the funds to redeem. Moreover, under the prudent man rule, loss of control, improper delegation, commingling of funds, and questionable marketability account for the avoidance of shared investments by trustees. The same objections can be made with respect to investments in mutual funds, common trust funds, life insurance annuities left with insurance companies, and similar commingled investments. However, recent legislation, by permitting investment in mutual funds and common trust funds, has overridden these objections with respect to some modern securities.[161] Diversification of investment is a factor that the prudent man would always consider, and most often judge to be wise, but the prudent man rule itself does not make diversification mandatory.[162] Finally, if there are successive beneficiaries, the prudent man rule requires that the trustee maintain an even hand between the interests of income beneficiaries and those of capital beneficiaries.[163]

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[157] For example, Hawaii applies the concept to trust companies only. New Jersey and Virginia retain the legal list but, on the basis of the prudent man rule, permit investment in corporate stocks up to specified limits. New Hampshire allows investment in stocks under a modified rule. Wisconsin has adopted the rule for all trust investments, but limits the proportion of the trust assets that may be invested in stocks. North Dakota has also adopted the rule for all trust investments, but requires a proportion of the trust funds to be invested in United States bonds.

[158] A list of articles is given by Scott, *supra*, note 140, Vol. 3, § 227.13, *n*. 1. See, also, Wilcox, "Trusts – Trustee Investments – The Return of the Prudent Investor Rule" (1973), 24 Mercer L. Rev. 513.

[159] Reasonable care and caution remain the requirement, although some American jurisdictions require a higher standard of care of the professional trustee. The higher standard means that a professional will be required to show that he adhered to the office procedures and standards of proficiency that would be followed by members of that profession. To compensate for the higher standard of care, it is argued that, even if non-professional trustees are restricted to the legal list, professional trustees should have the prudent man power of investment: see Buek, " 'Qualified' Trustee Performance Calls for Full Investment Freedom" (1960), 99 Trusts & Es. 194. The subject of the professional trustee was discussed in greater detail *supra*, ch. 2, sec. 2(c).

[160] *Supra*, note 153, at 223, § 1.

b. Canada

As previously mentioned in our discussion of the historical development of trustee investment powers in Canada,[164] the Conference of Commissioners on Uniformity of Legislation in Canada adopted, in 1970, a new Uniform Trustee Act[165] that departed entirely from the concept of the legal list. This Uniform Act, creating a new investment power, has only three short sections. The first and most important section provides as follows:

> 1. Unless a trustee is otherwise authorized or directed by an express provision of the law or of the will or other instrument creating the trust or defining his powers and duties, he may invest trust money in any kind of property, real, personal or mixed, but in so doing, he shall exercise the judgment and care that a man of prudence, discretion and intelligence would exercise as a trustee of the property of others.

This section places in statutory form the prudent man concept,[166] and is based in part on the American Model Act.[167] However, the section is couched in the language of the prudent trustee and, to this extent, it adopts the prudent trustee formulation of the Michigan[168] and Minnesota[169] statutes. The Quebec Commissioners were of the opinion that this standard, namely, the prudence that would be shown by a person who is handling someone else's property, was to be preferred to the prudence that would be shown by a person in the handling of his own affairs, since the latter "might speculate with some of his own funds in a way that he would not with funds he was administering for others".[170] The formulation of the prudent man concept in this way, therefore, recognizes the existence of a trust and beneficiaries as a constant in the varying circumstances that confront the prudent man in the office of trustee.[171] In the year of adoption by the Commissioners, the Uniform Act was adopted by New Brunswick[172] in place of its legal list, and the Northwest Territories and the Yukon[173] followed suit.

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[161] See statutes collected in Scott, *supra*, note 140, § 227.9, at 1830-32, *n*. 26.

[162] See, generally, *In re Buhl's Estate*, *supra*, note 144. Some courts have decided that there is a duty to diversify (for example, *In re Muellers' Trust*, *supra*, note 136) whereas even those jurisdictions that are more inclined to investment list thinking have not thought diversification should be mandatory: see *In re Mendleson's Will*, 261 N.Y.S.2d 525 (Sur. Ct. Alb. Ct. 1965).

[163] *Harvard College v. Amory*, *supra*, note 139.

[164] See *supra*, this ch., sec. 2(b)(ii)b.

[165] Uniform Trustee Act, *supra*, note 55, at 35 and 115-17.

[166] See *supra*, this ch., sec. 2(c).

[167] *Supra*, note 153.

In 1982, the Manitoba Law Reform Commission issued its *Report on Investment Provisions under "The Trustee Act"*.[174] Until recently, the Manitoba *Trustee Act*, like the Ontario Act, adhered to the legal list approach to trustee investments.[175] In its Report, the Commission canvassed the arguments in favour of the retention of the legal list and those supporting the prudent man approach to trustee investments. The Commission concluded that the legal list does not accomplish the two major objectives of most trustees, namely, preserving the capital and generating income. Today, as the Commission noted, "[i]nvestors who wish to strike a fair balance between preservation of capital and suitable income must be flexible, sophisticated and aggressive".[176] As to the proponents of the legal list, the Manitoba Commission was of the view that support for the legal list is based primarily on two misconceptions: first, "that if a trustee follows the legal list he will be immune from being sued";[177] and secondly, "that if there is a prudent man rule, every time the trustee makes a bad investment, he will have to make good the loss".[178] After an examination of the relevant law, the Commission was of the opinion that neither of these positions could be supported.[179]

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[168] Mich. Comp. L. 1967, § 555.201.

[169] Minn. Stats. Ann., § 501.125.

[170] Report of Pigeon & Durnford, "Trustee Investments", in Proceedings of the Forty-Ninth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1967), at 222. The grounds for the original recommendation of the prudent man rule by the Quebec Commissioners in 1966 are set out in Proceedings of the Forty-Eighth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1966), at 106-13. The recommendation was adopted at the 1966 Conference. For the subsequent reports concerning the form of the Uniform Act, see 1967 Proceedings, at 222-40; 1968 Proceedings, at 169-71; and 1969 Proceedings, at 181-84.

[171] Waters, *supra*, note 8, at 687.

[172] *An Act to Amend The Trustee Act*, S.N.B. 1971, c. 73.

[173] See the Northwest Territories *Trustee Ordinance*, *supra*, note 59, and the Yukon *Trustee Ordinance*, *supra*, note 60.

[174] Manitoba Law Reform Commission, *Report on Investment Provisions under "The Trustee Act"* (Report No. 50, February 12, 1982) (hereinafter referred to as "Manitoba Report").

[175] *The Trustee Act*, R.S.M. 1970, c. T160, s. 70(2).

[176] Manitoba Report, *supra*, note 174, at 7.

[177] *Ibid.*, at 8.

Accordingly, the Manitoba Law Reform Commission recommended that the legal list contained in *The Trustee Act* should be repealed and replaced by the prudent man rule. The Commission favoured the formulation of the rule contained in the Uniform Trustee Act, subject to eliminating the tautology of defining a trustee as a trustee.[180] In addition, rather than listing general guidelines in the Act that would assist trustees in making investment decisions under the prudent man rule, the Manitoba Commission recommended that a Trustee's Handbook and Guide should be prepared and made available to the general public to assist and instruct trustees in this area. Finally, the Manitoba Commission recommended that an additional section should be enacted stating that, "if a trustee is sued for imprudence, it shall be a defence for that trustee to show that while a particular investment viewed in isolation may have been speculative or imprudent, the trustee nonetheless followed a prudent investment policy and that this total policy was not speculative and not imprudent".[181] In 1982, the Manitoba Legislature enacted legislation, amending *The Trustee Act*, which replaces the existing investment provisions with new provisions that implement the recommendations of the Manitoba Law Reform Commission.[182]

(d) OBJECTS AND PROBLEMS OF CONTEMPORARY TRUST INVESTMENT

The overview of the historical development of trustee investment powers in England, Canada, other Commonwealth countries, and the United States reveals that the permissible scope of trustees' investment powers has often been a function of the economic and financial conditions of the time. As we have seen, at the beginning of the twentieth century, in both England and Canada, and in some jurisdictions of the United States, statutory legal lists set forth the securities thought to be appropriate for the purpose of investment by trustees. These legal lists tended to reflect the philosophy that a trustee should be a conservator of the trust fund and, as such, investment was limited to those securities that were considered "safe", namely, fixed-interest government and public authority bonds and debentures. A trustee was not viewed as a creator of wealth, so that any form of speculative investment that would place the capital at risk, such as investment in common shares, was considered at that time to be imprudent. This policy of investment served trusts well for a time, as fixed interest securities produced not only a steady annual income, but also guaranteed the return of the dollar value at par on maturity, thereby enabling a trustee to preserve the dollar amount of the corpus. However, the attractiveness of the policy was largely dependent upon the exceedingly low or non-existent inflationary factor and the stability of currency values of that period. These conditions are now historic.

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[178] *Ibid.*

[179] *Ibid.*, at 9-14.

[180] *Ibid.*, at 14-15. The formulation of the Manitoba Law Reform Commission is as follows, at 37:

> Unless otherwise authorized or directed by an express provision of the law or of the will or other instrument creating the trust or defining the duties and power of the trustee,
>
> (a) subject to paragraph (b), a trustee is authorized to invest in every kind of property, real, personal or mixed; and
>
> (b) in investing money for the benefit of another person, a trustee shall exercise the judgment and care that a man of prudence, discretion and intelligence would exercise if he were administering the property of others.

[181] *Ibid.*, at 27.

[182] *An Act to Amend The Trustee Act*, Bill 35, 1982 (33d Leg. 2d Sess.), ss. 5 and 6, repealing ss. 70 to 77 and substituting new ss. 70 to 77 and 79.1. The Act (S.M. 1982-83, c. 38) received Royal Assent on August 18, 1983 and was declared in force October 1, 1983.

Today, the problem of inflation, the erosion of the real value of currency, that has developed especially since the Second World War shows every sign of being a constant factor in our economy. The impact of inflation upon the policy that trustees should invest in "safe" fixed-income securities has been devastating. Practically speaking, where trust assets are invested in fixed-income securities, the trust beneficiary's income will not rise in proportion to the increase in the cost of living. In fact, a beneficiary's real income will probably decline, especially if he is tied to long-term, low-yield bonds. The remainderman may suffer as well, because, at the time of distribution, the real value of the trust fund may have decreased to only a fraction of its purchasing power at the time of investment. Consequently, as a result of inflation, any policy that limits trust investments to fixed-income securities, or at best requires that a major portion of the trust fund be invested in such securities, no longer serves to protect the interests of the trust beneficiaries.

The problem of inflation and its impact on trustee investment policy was one of the more important reasons for the rapid ascendancy of the prudent man concept in the United States. The adoption of this approach to trustee investments, permitting as it does flexibility in choice of investments to meet changing economic conditions, reflects the realization that there is no longer any single investment upon which even the most conservatively inclined investor can rely. This approach recognizes that every investor must take account of the economic cycles and market movements and be in a position to adjust his portfolio to meet not only periods of rapid growth in the economy, but also static and slow growth periods. As various types of investment perform differently during each cycle in the economy, experience shows that, today, flexibility and a diversified portfolio are the best weapons in an investor's hands.

For example, during an inflationary period, trustees of a testamentary trust in favour of a surviving spouse and children may be well advised to include in their portfolio both high grade, short term bonds and well seasoned and well diversified common shares: the bonds will ensure a regular and adequate income for the life beneficiary, while the common shares will preserve the purchasing power of the fund for the benefit of the remaindermen. Even if the trust is solely in favour of infant children, for example, liquidity will be needed for such purposes as tax payments and powers of maintenance. Further, assets must be chosen with marketability in mind for the expected date of trust termination, and trust objects will exist where capital growth, rather than a high income yield, is the desirable policy to pursue. Moreover, a trustee of a family trust needs to be in a position to acquire sound stocks when the occasion arises to make the investment. The existence today of so many large pension trusts, constantly in search of such stocks, necessitates that trustees of the family trust at least have that flexibility.

(e) THE FUTURE: LEGAL LIST OR PRUDENT MAN

In determining the investment powers that should be included in the revised Act, it is evident that the essential choice for reform is between a legal list philosophy and the prudent man approach. We now turn to consider the advantages and disadvantages of each approach.

(i) Legal List Approach

It will be recalled that Ontario is a legal list jurisdiction; indeed, a "pure" legal list philosophy may be said to be reflected in the present Ontario *Trustee Act*. Under the Act, additions to the legal list may only be made by statutory amendment, which is also required to vary the percentage of trust funds that trustees are permitted to invest in corporate securities, including common shares – a percentage fixed, at present, at thirty-five percent,[183] which may be inappropriate in periods of high inflation. Moreover, having adopted a legal list as the Ontario Act has done, it is difficult to know what other criteria a trustee should take into account in the exercise of his investment powers. For example, diversification of investment is not required expressly by the Ontario *Trustee Act*, and it is not clear whether case law insists upon it as a measure of prudence.[184]

As the previous discussion illustrates, there is no single concept known as *the* legal list, and there are a number of variations that could be introduced in the revised Act.

First, the revised Act could adopt the scheme of the English *Trustee Investments Act, 1961*.[185] This Act, however, has been criticized on the grounds of complexity.[186] The provisions of the Act concerning narrower, wider, and special property ranges, combined with the compensating cross-transfer requirement, do, indeed, appear complex. Further, the Act seems unduly suspicious of the efficiency of the case law duty of care, skill, and caution. While the Act does require trustees to consider the need for diversification of investment, it continues to impose a restriction on the percentage of assets that may be invested in corporate securities. The Act has also been criticized for the ease with which companies who wish their shares to qualify as authorized investments may by-pass the Act's provisions intended to give security to beneficiaries in relation to equity investments. For example, the shares of a corporation that pays dividends out of reserves rather than profits may qualify as an authorized investment, while the shares of a more profitable corporation, which for good business reasons chooses not to pay a dividend in one particular year, would not so qualify.

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[183] *Trustee Act*, *supra*, note 6, s. 27(2).

[184] *Supra*, note 9.

[185] *Supra*, note 32. See, *supra*, this ch., sec. 2(b)(iii)b.

[186] See English Law Reform Committee Report, *supra*, note 80, at 16. See, also, Samuels, "Trustee Investments Act, 1961" (1961), 25 Conveyancer (N.S.) 372, and (1962), 26 Conveyancer (N.S.) 351; Keeton, *supra*, note 36, at 19 *et seq.*; Trew, "The Trustee Investments Act, 1961 – Three Years After", [1965] J. Bus. L. 22; and Oerton, "Trustee Investments Act Problems" (1970), 120 New L.J. 240.

An attractive aspect of the present English Act is that new investments may be added to the legal list by Order-in-Council,[187] and the percentage of assets to be invested in particular securities may be varied by an Order of the Treasury.[188] The advantage of these provisions is that they do not compete for legislative time. Accordingly, in this fashion, the legal list and the permitted percentage can more readily respond to a significant change in economic and hence market conditions. However, the provisions do no more than provide an alternative procedure – they are not directed to policy considerations. For example, the task of selecting additions to the legal list is made no easier, whether the additions are made by Order-in-Council or by statutory amendment. Moreover, it may be questionable whether a change in the legal list or a variation of the permitted percentage, by whatever means, would assist trustees to respond satisfactorily to economic conditions that have already occurred.

The proposals for reform made by the English Law Reform Committee[189] would modernize and simplify considerably the statutory power of investment in England. Nevertheless, the insistence upon advice for certain types of investment, while perhaps beneficial to the inexperienced trustee, may, nonetheless, involve more than a nominal cost. Moreover, the suitability of the investment often will depend upon the quality of the advice; for his part a trustee must be able to discern between good and bad advice, while the adviser must understand the difference between advising a person investing his own assets and advising a fiduciary.

Secondly, the revised Act could adopt a variation of the legal list similar to that contained in both the Western Australia[190] and New Zealand[191] Acts. As we have seen,[192] although these Acts retain a list of authorized investments, they impose no ceiling percentage upon the amount of the trust fund that may be invested in corporate securities, including common stock. Rather, the Acts rely upon the imposition of qualifications that companies must satisfy before their securities may be authorized as investments, and upon specific statutory duties imposed upon trustees, namely, a duty to consider the suitability of each investment, to seek advice, and, in the case of Western Australia, to diversify investments. Beyond these statutory requirements, a trustee is left to invest on the basis of the case law duty of care, a duty that may be of great significance since, as we noted in relation to the English Act, the notion of "qualified company", with the inference of profitability and stability, may be illusory: a company can satisfy the statutory requirements by issuing paid-up shares to existing shareholders, and by declaring dividends out of reserves where profits are inadequate. However, the deletion of a percentage ceiling for investment in corporate debentures and preferred and common stock may not be an effective improvement, if it serves to restrict trustees to investment in companies that merely have to satisfy nominal rules.

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[187] *Trustee Investments Act, 1961*, *supra*, note 32, s. 12.

[188] *Ibid.*, s. 13.

[189] English Law Reform Committee Report, *supra*, note 80, and accompanying text.

[190] *Trustees Act, 1962*, *supra*, note 95.

[191] *Trustee Amendment Act, 1974*, *supra*, note 96.

[192] See *supra*, this ch., sec. 2(b)(iii)c.

A further variation of the legal list philosophy that could be adopted in the revised Act would be to provide a broader and more liberal list than that contained at present in sections 26 and 27 of the Ontario *Trustee Act*. An example of such a list, designed for the investment of the funds of life and other insurance companies, is contained in the federal *Canadian and British Insurance Companies Act*.[193] In private trusts, the investment power of trustees is not infrequently expressed with reference to this list. However, the Act's percentage limitations, which bring about diversification within the authorized list, are usually made expressly inapplicable by the trust instrument. The advantage of this practice is that the creator of the trust can impose his own restraints upon possible future speculation, and yet bring a broader class of investments within the trustee's power. The disadvantage is that this list was designed for the considerable funds of insurance companies, and may not be appropriate for adoption by smaller sized funds of private trusts.

Finally, the revised Act could adopt the approach found in the American jurisdictions that employ a permissive legal list. This approach, as previously discussed,[194] offers a legal list, but statutorily permits investment of a certain portion of the trust fund according to the prudent man rule. Accordingly, it imposes a measure of control on trustees by limiting the extent to which they may invest outside the legal list. However, the other side of the coin is that this restriction may work to the disadvantage of trustees by denying them the flexibility to invest, as would a prudent man, more than the stipulated portion.

The fundamental rationale of a legal list approach, whatever be its variations, is constant. In general terms, the argument for a legal list is essentially that private trustees, as opposed to professional trustees, are often chosen for their personal character and knowledge of the family of the creator of the trust, whose members would usually be selected as beneficiaries. Such persons may tend to have limited investment knowledge. For these trustees the legal list offers a range of investments that have received the sanction of the legislature, and provides statutory guidelines regarding the permitted percentage of trust assets that may be invested in particular securities. Further, non-professional trustees may take comfort in the knowledge that, in all probability, they will not incur liability for breach of trust on the grounds of improper investment, if they keep to the legal list and give thought to the choice of investments that they make. Moreover, testators and settlors may well desire a restricted investment power to protect their trusts from speculation; once significant loss has occurred, there may be no quarter from which it can be recouped. In addition, some personal trustees may find that the list provides protection against a beneficiary who is anxious to see the trust funds invested in an asset that the trustees consider unwise in the circumstances.

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[193] *Supra*, note 63.

[194] See *supra*, this ch., sec. 2(b)(iii)d.

Balanced against these considerations it may be contended that the adoption of a legal list encourages trustees, even if they have a wider power of investment under the instrument, to "play safe" by keeping to the legal list. As a result, unless there exists a statutory duty to diversify, trustees may decide to invest the whole portfolio of trusts assets in legal list bonds. In economic conditions of low inflation, such an investment would produce a reasonable income as well as secure the dollar value of the capital invested, so that trustees administering a trust with successive beneficiaries would have met their duty to act impartially as between income and capital beneficiaries. However, during periods of high rates of inflation such an investment would not sufficiently compensate for the erosion of purchasing power of the dollar and would result in considerable loss to the capital beneficiaries. At such times, a more substantial investment in common shares, for example, may be called for in order to overcome the effects of inflation. The essential problem, therefore, with the legal list is that it is "a list for all seasons", and, as diversification of investment seems to be an optional policy for trustees, trust beneficiaries may be exposed to a real risk of nonrecoverable loss when the statutorily authorized investments are employed in unsuitable economic times.

(ii) Prudent Man Approach

The final approach to reform of trustee investment powers is the prudent man concept. As we have discussed at length in an earlier section of this chapter,[195] this concept, expressed in various forms, requires a trustee in making or otherwise dealing with trustee investments to act with the care and discretion of a prudent man. Further, we pointed out that the growth of this investment concept, especially in the United States, was largely a result of the economic factors of inflation and instability of currency values, and the realization that the legal list approach to investment was not capable of adapting to these ever-changing economic forces. Consequently, jurisdictions turned towards the prudent man concept of investment, a concept that enables trustees to respond quickly to changed economic and financial conditions. Further, it is argued that the even hand rule may be more easily applied by trustees if they possess an investment power restricted only by the requirement of prudence.

However, the prudent man rule has been criticized. A number of commentators have taken the position that the concept places too much emphasis on the preservation of the dollar value of the principal, whereas inflation is a phenomenon that hurts the life tenant as much as the eventual capital remainderman.[196] This factor may be particularly significant where the primary object of a trust is to maintain a sufficient income for the life tenant, and where it is the maintenance of income rather than of capital that is the real investment problem. In response, it may be said that the intention of the prudent man concept is not only to permit investment in equities at times of high inflation in order to protect capital, but also to permit diversification of investment to meet the various needs of a trust during all kinds of changing economic and financial conditions.

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[195] See *supra*, this ch., sec. 2(c).

It has also been pointed out that advice may be needed by those who formerly could have relied upon the legal list for guidance. Investment advice can be said to be costly to obtain and may not be readily available to trustees outside large urban centres. However, it is arguable that this state of affairs only reveals the true situation that fiduciaries face in modern investment conditions, namely, that there is a need for guidance and specific advice, and even legal list jurisdictions recognize that expert advice is now essential.[197] As to the availability and cost of advice, it may be contended that in present day investment circumstances these are factors that the creator of a trust should consider when he is initially selecting his trustees. For example, it might be wise for the creator of a trust to select a trustee, possibly a professional trustee, who has access to investment advice.[198] If the creator of a trust also desires to appoint a member of his family or a friend as trustee, the trustee with access to investment advice could be given exclusive responsibility and liability for investment decisions.

Finally, it has been suggested that the prudent man concept requires a trustee to guess in advance the kind of investments that the courts may later determine to be suitable for the investment of trust assets if an action for breach of duty is commenced.[199] However, if this argument had any validity in practice, it would surely have surfaced by now in those many American jurisdictions that employ the prudent man concept. Further, experience has shown that, in the early 1930's in the United States, when there was a national patchwork quilt of investment lists and when trustees were frequently sued for having made unwise investments, the courts were scrupulous in examining each case from the vantage point of the trustees *vis-à-vis* the particular investment decision, and in considering the trustee's position when the challenged investment was made.[200] There is no reason why this judicial approach should not continue. Moreover, it is arguable that, as most legal lists are subject to a duty of care, a trustee may not be completely relieved from the need to speculate in advance what a court's response will be to a concentration of trust assets in a particular investment contained in the legal list. The listed investments were not intended to give automatic protection to trustees.[201] The utilization of the prudent man concept, it is said, reveals the true position, namely, that every trustee must exercise individually his duty of care in making investment decisions.

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[196] See, for example, Blair and Heggestad, "The Prudent Man Rule and Preservation of Trust Principal", [1978] U. Ill. L. F. 79; McSwain, "A Modern Analysis of The Prudent Man Rule" (1967), 106 Trusts & Es. 742; and Langbein and Posner, "Market Funds and Trust-Investment Law", [1976] ABF Res. J. 1.

[197] See English *Trustee Investments Act, 1961*, *supra*, note 32, s. 6(2) and (4); Western Australia *Trustees Act, 1962*, *supra*, note 95, s. 16(5); and New Zealand *Trustee Amendment Act, 1974*, *supra*, note 96, s. 3.

[198] It should be remembered that all trustees are statutorily entitled to remuneration by order of the court, unless the trust instrument specifies otherwise: see the Ontario *Trustee Act*, *supra*, note 6, s. 61.

[199] Aspects of this issue are examined in a useful discussion by Professor J.F. Burrows, "Statutes and Judicial Discretion" (1976), 7 N.Z. U. L. Rev. 1.

[200] See Scott, *supra*, note 140, § 227, at 1808-09.

(iii) Conclusion

Having reviewed the various formulations of the legal list philosophy and the prudent man approach to trustee investment powers, and having regard to the objectives and problems of modern trust investment, is there a sufficient case for change from the present Ontario position? The Commission is of the opinion that there is such a case, and, although there is much force in both arguments – for legal list and prudent man – we have concluded that there is greater force in the combined disadvantages of a legal list and the advantages of the prudent man approach to trustee investment powers. We are, therefore, in general agreement with the views, previously set forth, that advocate the prudent man concept.

It is clear to the Commission that the flexibility and diversification that the prudent man concept brings to investment choices are characteristics that are vital to the well-being of any trust in today's economy. Essentially, given modern economic conditions, we have concluded that the safeguards of the legal list are illusory. We also agree with the Western Australia and New Zealand position that any explicit restriction on the percentage of trust funds that may be invested in corporate securities is unsatisfactory because market conditions change. We are further impressed with the fact that express investment clauses, conferring upon trustees a discretionary investment power, are so widely employed by trust instruments that the present legal list is effectively ignored. Furthermore, we note that the duty to maintain an even hand between income and capital beneficiaries, so far as it is not excluded by the trust instrument, is an obligation imposed upon trustees quite apart from the nature of their power of investment. A legal list can be viewed merely as an extra hurdle for trustees, who must ensure in any event that income beneficiaries and capital beneficiaries are equitably treated by their investment policy.

We are also influenced by the fact that both what is now the Uniform Law Conference in Canada, and the American Bankers Association have endorsed the prudent man concept. Operating as Ontario does in the North American economic structure, we are impressed with the fact that over four-fifths of the United States jurisdictions, not to mention four jurisdictions in Canada, have adopted the prudent man concept in one form or another. The American jurisdictions have had long practical experience with this concept, and we have been unable to find any appreciable comment to the effect that it has significant defects in practice.

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[201] See Pettit, *supra*, note 65, at 280-81.

We have considered closely the various legal list approaches, but we have concluded that the logical end result is the position of the prudent man, a result at which the majority of American jurisdictions have already arrived. It is evident that among legal list jurisdictions no two jurisdictions can agree entirely upon the nature and structure of the statutory requirements, and that each such jurisdiction is compelled within a period of time to review the matter yet again.

Given the fact that any revision of the Ontario *Trustee Act* will, if past experience is any indication, endure for a considerable number of years, we have concluded that the time is proper for a change to the prudent man concept of investment. Accordingly, the Commission recommends that sections 26 and 27 of the Ontario *Trustee Act* should be deleted, and that in their place the revised Act should adopt a version of the prudent man concept for trustee investment powers.

The secondary issue that arises is the formal expression that should be given to this concept. The Commission finds itself in agreement with the formulation adopted by the Uniformity Commissioners of Canada in 1970, and now in force in New Brunswick, Manitoba, the Yukon, and Northwest Territories,[202] as well as in several jurisdictions in the United States.[203] We are persuaded by the argument that the courts may take the view that the prudent man formulation, to some uncertain degree, may reduce a trustee's fiduciary obligations. We do not intend this result, and we wish to emphasize that trustees must at all times realize that they are investing funds belonging not to themselves, but to the beneficiaries.

We are aware of the criticism that has been made of the prudent trustee formulation, namely, that since a trustee is a fiduciary, "prudent trustee" is a tautologous expression.[204] We have also taken note of the argument that the prudent trustee rule may encourage innate conservatism and adherence to previously approved investments, whereas trustees should examine their own trust situations when they make investment decisions. However, the Commission is of the opinion that a statutory expression of a discretionary investment rule should place stress on the caution, as well as the care and skill, that trustees should employ. The Commission recommends therefore that the duty of care previously recommended[205] should govern the power of investment.[206] It will be recalled that the basic duty of care proposed by the Commission would require that trustees exercise that degree of care, diligence, and skill that a person of ordinary prudence would exercise in dealing with the property of another person.

With respect to the investment power that should be contained in the revised *Trustee Act*, we are of the view, and accordingly recommend, that, subject to the basic duty of care and the terms of the trust instrument, trustees should be able to invest trust money in any kind of property.[207] We would note that we have provided in our Draft Bill a broad definition of the term "property" to mean real property, personal property or any estate, share or interest in property, and to include any debt, chose in action, and any other right or interest in property, whether in possession or not.[208]

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[202] See *supra*, this ch., sec. 2(c)(ii)b.

[203] See, for example, Michigan Comp. L. 1948, § 555.201, and Minnesota Stats. Ann., § 501.125.

[204] See Waters, *supra*, note 8, at 687.

[205] Draft Bill, s. 4. See, also, this Report, ch. 2, sec. 2, for a more detailed discussion of a trustee's general duty of care and recommendations concerning the professional trustee.

[206] Draft Bill, s. 34(1).

The final point that the Commission wishes to discuss is whether the above-recommended general duty imposed upon trustees should be bolstered by a list of criteria that trustees may consult when making investment decisions. The list that appears in the Restatement on Trusts, Second[209] provides a ready example of the approach we have in mind.

Against this approach, it may be contended that criteria intended to be guidelines may in effect become mandatory. A trustee who, in an action for breach of investment duty, admits that he did not consider any particular criterion may, in practice, be admitting negligence. We do not think that this outcome would be desirable. However, we have concluded that the presence of statutory criteria would be helpful to trustees. It would provide basic investment guidelines that may be useful, particularly where expert advice is not readily available, or where the size of the trust fund does not justify the cost of such advice. Further, we are of the opinion that clear legislative language can preclude our intended statutory guidelines from achieving the character of mandatory directives. Accordingly, the Commission recommends that the revised Act should provide that in investing trust money under the statutory power of investment, among the matters that it is appropriate for trustees to consider are,

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[207] *Ibid*. In order to avoid confusion concerning the applicability of our proposed investment power to trust instruments that direct trustees by various general terms regarding the nature of their investment power, s. 34(4) of the Draft Bill provides that the expressions "legal investment", "authorized investment", "investment authorized by law", or words of similar import as used in a trust instrument should be taken to mean any investment that is authorized by the revised Act.

[208] Draft Bill, s. 1(*m*).

[209] American Law Institute, *Restatement of the Law, Second, – Trusts, 2d* (1959), § 227, comment *o*, lists the following criteria as matters that should be considered by trustees in determining whether or not a particular investment is prudent:

(1) the marketability of the particular investment;

(2) the length of the term of the investment, for example, the maturity date, if any, the callability or redeemability, if any;

(3) the probable duration of the trust;

(4) the probable condition of the market with respect to the value of the particular investment at the termination of the trust especially if at the termination of the trust the investment must be converted into money for the purpose of distribution;

(5) the probable condition of the market with respect to reinvestment at the time when the particular investment matures;

(6) the aggregate value of the trust estate and the nature of the other investments;

(7) the requirements of the beneficiary or beneficiaries, particularly with respect to the amount of the income;

(8) the other assets of the beneficiary or beneficiaries including earning capacity;

(9) the effect of the investment in increasing or diminishing liability for taxes;

(10) the likelihood of inflation.

(*a*) the marketability of the investment;

(*b*) the length of the term of the investment, including its maturity date, callability and redeemability;

(*c*) the probable duration of the trust;

(*d*) the probable condition of the market with respect to the value of the investment at the termination of the trust, especially if at the termination of the trust the investment must be converted into money for the purpose of distribution;

(*e*) the probable condition of the market with respect to reinvestment at the time when the investment matures;

(*f*) the aggregate value of the trust estate and the nature of the other investments;

(*g*) the effect of the investment in increasing and diminishing liability for taxes; and

(*h*) the likelihood of inflation.[210]

To ensure that the guidelines do not obtain the character of mandatory directives, we further recommend that the revised Act should expressly stipulate that the trustees are not obliged to consider each of the abovementioned criteria before deciding upon any investment.[211]

3. OTHER POWERS OF PROPERTY MANAGEMENT

(a) INTRODUCTION

Trustees must regard all trust assets as investments unless otherwise instructed by the trust instrument. Their duty is to preserve the fund, rather than the assets that constitute the trust fund at any particular moment. In order to accomplish this purpose, a trust instrument should confer upon trustees powers of sale, purchase, and exchange. In addition, trustees must manage the assets. In the case of land, they require authority to maintain and repair buildings, to insure, to mortgage, and to lease. With respect to securities, trustees should be able, for instance, to take up bonus issues and options, to vote at company meetings, and to agree or otherwise respond to proposals for reorganizations and mergers. If trust property constitutes or includes a business, trustees should have the authority to carry on the business, if that is what the creator of the trust intended. For their efforts in administering the trust property, trustees should usually be entitled to compensation from the trust. These are, of course, only the basic authorities that trustees require; the purpose of the trust and the nature of the initial trust assets will differ from instrument to instrument and, to a degree, each trust will require its own set of authorities or powers. If, for example, land or securities initially transferred to trustees are to be retained, this position will be reflected by the trust instrument; the power of sale will be withheld, even if an express duty to retain is not otherwise apparent in the instrument.

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[210] Draft Bill, s. 34(2). It will be noted that we have not recommended the adoption of criteria 7 and 8 of the American Restatement. We are of the opinion that these criteria, which focus upon the requirements of beneficiaries, are more applicable to considerations of even-handedness than of investment.

[211] Draft Bill, s. 34(3).

In other words, the powers conferred by a well-drawn trust instrument will reflect the individuality of the trust, its purpose and character. However, not all instruments are so designed, and the question that arises is whether there is a set of standard powers that should be incorporated in the revised Act. The object of such an incorporation would be to ensure that trustees are not deprived of a vital power, and that no trust is put to the expense and inconvenience of an application to the court because, through inadvertence in drafting, a necessary power has been omitted. We are of the view that, consistent with our proposal that the revised Act should provide supportive and facultative powers for trustees,[212] there should be included in the revised Act of a list of ancillary trustee administrative powers that could be amended or denied by the creator of the trust.

Before considering proposals for reform, we think it desirable to review briefly the existing statutory provisions in Ontario and other jurisdictions. We shall refer first to the position under trustee legislation, and thereafter the provisions of settled estates legislation will be discussed.

(b) EXISTING STATUTORY POSITION IN ONTARIO AND OTHER JURISDICTIONS

(i) Trustee Acts

a. Ontario

At present, the Ontario *Trustee Act*[213] confers a variety of administrative powers upon trustees. Some of these powers deal with matters that are discussed elsewhere in this Report.[214] Of the other powers, the following may be briefly mentioned. Section 17 confers upon trustees who already have a duty or power of sale under the terms of the trust instrument a wide discretion concerning the mode of sale. Section 19 empowers trustees, with the approval of the Ontario Municipal Board or a judge of the Supreme Court, to dedicate or sell land for highway purposes. Section 21 authorizes trustees to insure trust property against loss or damage by fire, tempest, or other casualty to an amount not exceeding three-fourths of the value of the property. Section 22 extends to trustees who hold renewable leasehold property the power to renew the lease or leases in question. Section 24 makes a receipt issued by trustees an effective discharge to the payor.

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[212] See *supra*, ch. 1.

[213] *Supra*, note 6.

[214] The power of investment is dealt with *supra*, this ch., sec. 2, and the power to allocate receipts and disbursements between income and capital beneficiaries is dealt with *infra*, this ch., sec. 4.

The Act also contains two further powers, which relate to the investment provisions. First, section 28 empowers trustees to deposit funds with a bank or trust company pending investment of any trust money. Secondly, section 29 authorizes a trustee to "vary or transpose any securities in which money in his hands is invested . . . into or for any other securities of any nature authorized by this Act". The remaining administrative powers contained in the Act cover diverse matters: section 33 empowers trustees to reimburse themselves for expenses incurred in the administration of the trust; section 36 confers upon trustees the power, under court order, to pay money into court; and section 48 authorizes trustees to compromise claims by or against the trust.

Finally, regarding the implementation of these various powers, section 60 provides that trustees may apply to the court for directions "on any question respecting the management or administration of the trust property". It has been held that, while this section enables trustees to secure a ruling concerning the legal nature and extent of their duties and powers under the instrument, it does not entitle trustees to obtain directions from the court concerning how they should exercise the discretion that arises from the employment of their powers.[215] Nor does the section enable trustees to obtain a judicial extension or enlargement of their powers under the instrument.

If trustees require a power that is not contained in either the trust instrument or the Act, they may seek relief in one of two ways. First, the court, pursuant to its inherent jurisdiction, may confer upon trustees enlarged powers. However, this is only an emergency, or salvage, authority and is limited to situations where it can be demonstrated that the lack of a particular power will place the trust in severe jeopardy.[216] Secondly, applications for a grant of additional powers may be brought under the *Variation of Trusts Act*,[217] a statute designed primarily for the variation of the beneficial interests created by the instrument. This Act requires that all beneficiaries who are *sui juris* consent to a proposed variation of the trust instrument, and that the court determine that the variation is for the benefit of infant, unborn, and unascertained beneficiaries.

All the statutory administrative powers contained in the Ontario *Trustee Act* are subject to the expression of a contrary intention in the instrument by the creator of the trust;[218] that is, the trust instrument may extend, add to, limit, or abrogate the powers created by the Act.

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[215] See *Re Collins* (1927), 61 O.L.R. 225, [1927] 4 D.L.R. 770 (App. Div.). See, also, Waters, *supra*, note 8, at 753-59.

[216] See Waters, *supra*, note 8, at 905 and 906-07.

[217] *Variation of Trusts Act*, R.S.O. 1980, c. 519. See, *infra*, ch. 7, for a more detailed discussion and recommendations concerning the *Variation of Trusts Act*.

b. Other Canadian Jurisdictions

The Trustee Acts of other provinces, and the Ordinances of the two territories, contain many of the same administrative powers as those existing in the Ontario *Trustee Act*.[219] However, the Acts of other Canadian jurisdictions have been more extensively revised than the Ontario Act and, therefore, contain some powers that do not appear in the Ontario legislation. For example, the Manitoba *Trustee Act*[220] contains a power to lease trust property,[221] and a power to take back a mortgage on the sale of trust property.[222] The British Columbia *Trustee Act*[223] provides for the repair or improvement of land, or for the erection or improvement of buildings.[224]

To respond to circumstances where additional administrative powers are sought, four provinces and the two territories have adopted a provision, modelled upon section 57 of the English *Trustee Act, 1925*.[225] This section confers upon the court much wider power than it possesses pursuant to its inherent jurisdiction,[226] and authorizes the court to confer upon trustees, applying for the same, power to sell, lease, mortgage, surrender, release, dispose, purchase, invest, acquire, or otherwise deal with the trust property where "in the opinion of the court" such a power is "expedient" for the "management or administration" of the property. Trustees in the remaining Canadian common law jurisdictions must either rely upon the inherent jurisdiction of the court or apply under variation of trusts legislation, which is in force in all common law provinces but Newfoundland, for conferment of additional administrative powers.

c. Other Commonwealth Jurisdictions

For the most part, Commonwealth Trustee Acts, like those of Ontario and other Canadian jurisdictions, have been influenced by the successive trustee statutes of England. With respect to trustee administrative powers, the legislation of the Australian jurisdictions and of New Zealand has followed a similar pattern, that is, the legislation has provided a limited number of powers that may be excluded or modified by the trust instrument.

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[218] *Trustee Act*, *supra*, note 6, ss. 67-68.

[219] These jurisdictions also follow the same policy as Ontario of permitting the creator of the trust to exclude or amend the statutory provisions. However, only Ontario and Manitoba subordinate the provisions of their Acts in a general manner. The other jurisdictions subordinate the Act to the trust instrument on a section by section basis.

[220] *Supra*, note 175.

[221] *Ibid.*, s. 29.

[222] *Ibid.*, s. 27(4).

[223] R.S.B.C. 1979, c. 414.

[224] *Ibid.*, s. 11. The section requires a petition to be made to the Supreme Court of British Columbia.

[225] *Supra*, note 31. The six Canadian jurisdictions that have adopted the English provision are as follows: Alberta (*The Trustee Act*, R.S.A. 1980, c.T-10, s. 21); Manitoba (*The Trustee Act*, *supra*, note 175, s. 60); New Brunswick (*Trustees Act*, *supra*, note 58, s. 25); Nova Scotia (*Trustee Act*, R.S.N.S. 1967, c. 317, s. 50); Northwest Territories (*Trustee Ordinance*, *supra*, note 59, s. 20); and Yukon Territory (*Trustee Ordinance*, *supra*, note 60, s. 23). See, further, *infra*, this ch., sec. 3(e).

[226] See Waters, *supra*, note 8, at 905 and 906-07.

However, in 1956, New Zealand[227] extended considerably its statutory list of powers. Western Australia[228] modelled this aspect of its revised legislation upon the New Zealand changes, and, in the *Trusts Act 1973*,[229] Queensland based its revised provisions largely upon those of Western Australia. These jurisdictions confer upon trustees a number of powers that are absent from the Ontario *Trustee Act*, including, in general terms, the following powers: to sell trust property; to exchange trust property; to concur in the partition of, and to lease, or sublease, trust property; to purchase or rent a house or apartment as a home for a life tenant and family, and to build a house for that purpose.[230] The recent legislation of New Zealand, Western Australia, and Queensland contains, as well, powers of a management nature. Without attempting at this stage to be specific, these powers may be summarized as follows: to maintain the trust property; to improve or develop the trust property; to renew or vary any mortgage that is part of the trust property, or to which the trust property is subject; to give a new mortgage, or otherwise raise money on the security of trust property; to carry on the testator's business for a period after his death; to convert the business into a corporation; and to concur in a plan for the reorganization, amalgamation or sale of the undertaking of a corporation whose shares are part of the trust property.[231] In line with existing policy, all these powers may be added to, excluded, or modified by the trust instrument.[232]

d. United States

In the United States, the Uniform Trustees' Powers Act[233] has departed somewhat from the Commonwealth tradition. The Uniform Act was approved by the National Conference of Commissioners on Uniform State Laws, together with the American Bar Association, in 1964, and has been adopted to date by eleven states.[234] As with the Commonwealth legislation, the Uniform Act provides a long list of administrative powers, capable of exclusion or modification by the trust instrument.[235] However, one of the novel features of the Uniform Act is the addition of two provisions relating to a trustee's general duty and discretion. The first provision states that "a trustee has the power to perform, without court authorization, every act which a prudent man would perform for the purposes of the trust including but not limited to the powers specified . . .".[236] It follows, therefore, that the "prudent man" standard of behaviour not only governs the employment by trustees of the specific powers that are enumerated in the Uniform Act, but also defines a broad administrative power to perform "every act which a prudent man would perform for the purposes of the trust". The second provision states that, in the exercise of his powers, "a trustee has a duty to act with due regard to his obligation as a fiduciary".[237]

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[227] *Trustee Act 1956*, Repr. Stat. N.Z. 1977, No. 61.

[228] *Trustees Act, 1962*, *supra*, note 95.

[229] *Trusts Act 1973*, Queensl. Stat. 1973, No. 24.

[230] See New Zealand *Trustee Act 1956*, *supra*, note 227, s. 14(1) and (2); Western Australia *Trustees Act, 1962*, *supra*, note 95, ss. 27(1) and 17; and Queensland *Trusts Act 1973*, *supra*, note 229, ss. 22 and 32.

[231] See New Zealand *Trustee Act 1956*, *supra*, note 227, ss. 15, 21, 32, 33, and 12; Western Australia *Trustees Act, 1962*, *supra*, note 95, ss. 30, 43, 55, and 56; and Queensland *Trusts Act 1973*, *supra*, note 229, ss. 30 and 33.

[232] See New Zealand *Trustee Act 1956*, *supra*, note 227, s. 2(5), and Western Australia *Trustees Act, 1962*, *supra*, note 95, s. 5(2). However, the Queensland *Trusts Act 1973*, *supra*, note 229, states in s. 31(1) that Part IV of the Act, which contains general administrative powers, except when otherwise provided, "shall apply whether or not a contrary intention is expressed in the instrument (if any) creating the trust". A testator or settlor may, however, confer additional or larger powers upon trustees.

[233] National Conference of Commissioners on Uniform State Laws (73d Annual Conference, 1964), Uniform Laws Annotated (1978), Vol. 7A, at 761 (hereinafter referred to as "American Uniform Act").

A further unique feature of the Uniform Act is that it deals with cases of conflict of interest. As a general rule, the Uniform Act allows a trustee to apply to the court for consent to act whenever a conflict of interest and duty could arise in the exercise of a trust power.[238] By the terms of the Act, conflict occurs not only when a trustee's personal interests are involved, but also when the potentially opposing interest is that of another trust of which he is trustee.[239] However, the Uniform Act does specify five situations that may potentially involve technical conflicts of interest, but that are viewed as necessary for securing good estate management. In these situations, trustees need not obtain the prior consent of the court.[240] By way of illustration, the Act provides that a trustee may retain assets received from the creator of the trust until, in the judgment of the trustee, disposition of the assets should be made, even though they include an asset in which the trustee is personally interested.[241] Further, a trust company as trustee may, without the prior consent of the court, determine *bona fide* that a sound course would be to deposit trust funds in "a bank operated by the trustee".[242]

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[234] Florida (1974), Idaho (1965), Kansas (1968), Kentucky (1976), Maine (1979), Mississippi (1966), Montana (1974), New Hampshire (1969), Oregon (1977), Utah (1975), and Wyoming (1965). See, also, Scott, *supra*, note 140, § 186, at 1496-1500, and N.Y. Est., Powers & Trusts Law, §§ 11-1.1 to 11-4.7 (McKinney). See, also, for commentary on the American Uniform Act, Fratcher, "Trustees' Powers Legislation" (1962), 37 N.Y.U. L. Rev. 627; Horowitz, "Uniform Trustees' Powers Act" (1966), 41 Wash. L. Rev. 1; Hallgring, "The Uniform Trustees' Powers Act and the Basic Principles of Fiduciary Responsibility" (1966), 41 Wash. L. Rev. 801; Haskell, "Some Problems with the Uniform Trustees' Powers Act" (1967), 32 Law & Contemp. Prob. 168; and Report of Subcommittee of Committee on Estate and Tax Planning on "Administrative Clauses: Incorporation by Reference" (1967), 2 Real Prop. Prob. & Tr. J. 524.

[235] American Uniform Act, *supra*, note 233, §§ 2 and 3.

[236] *Ibid.*, § 3(a).

[237] *Ibid.*, § 3(b).

[238] *Ibid.*, § 5(b).

[239] *Ibid.*

[240] *Ibid.* Trustees may exercise the powers in § 3(c)(1), (4), (6), (18), and (24) without the consent of the court, although they may involve a conflict of interest situation.

[241] *Ibid.*, § 3(c)(1).

Finally, the Uniform Act introduces other novel features: it enables the court "to relieve a trustee from any restrictions on his power that would otherwise be placed upon him by the trust or by this Act";[243] it permits a majority of the trustees, when there are three or more, to exercise any of the listed administrative powers;[244] and there is a broad provision for the protection of third parties dealing with trustees.[245]

(ii) The *Settled Estates Act*

a. Ontario

The Ontario *Settled Estates Act*[246] governs "all estates or interests in land that are the subject of a settlement".[247] Under the Act, a "settlement" occurs where land stands "limited to or in trust for any persons by way of succession".[248]

Accordingly, the Act applies in two situations. First, where land is limited "to" persons in succession, for example, where X grants land to A for life, remainder to B in fee simple. The Act also applies where land stands limited "in trust" for persons in succession. This would occur where land is conveyed unto and to the use of T_1 and T_2 to hold in trust for A for life, remainder in trust for B in fee simple. In the first situation, A and B acquire legal interests; the settlement takes effect at common law and no trust of land is created. The second situation to which the Act applies involves a settlement of land by way of trust. The latter interests of A and B sound only in equity, legal title being vested in the trustees, T_1 and T_2.

The purpose of the *Settled Estates Act* is to empower the Supreme Court of Ontario, upon application, to authorize more extensive powers of disposition than would otherwise exist. To refer to our first example, the example of a common law settlement, A can, at common law, alienate his interest, the life estate, but no more; all the grantee would acquire would be an estate *pur autre vie*, an estate for the life of A. Likewise, in our second example, a settlement of land by way of trust, the only interest that A can alienate, absent statute, is his equitable life estate. The Act empowers the court to confer upon those persons authorized by the Act to apply for such relief[249] – generally the life tenant or other limited owner entitled to possession of the land[250] – certain powers, including the power to lease, to sell, and to mortgage, in the exercise of which all interests will be bound. Thus, in our earlier examples, A, as the holder of either a legal or equitable life estate, can apply to the court for power to alienate the estate in fee simple and bind successors in title. The point we wish to stress is that, even where there is a settlement of land by way of trust, although there is judicial authority that would permit an application by trustees for a grant of an administrative power in appropriate circumstances,[251] for the most part, it is the life tenant or limited owner in possession who may be the recipient of powers of administration and management.

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[242] *Ibid.*, § 3(c)(6). The issues raised by these provisions that deal with conflict of interest situations have been discussed in greater detail *supra*, ch. 2, sec. 4.

[243] American Uniform Act, *supra*, note 233, § 5(a).

[244] *Ibid.*, § 6(a).

[245] *Ibid.*, § 7. This section has been discussed previously *supra*, ch. 3, sec. 4.

[246] *Settled Estates Act*, R.S.O. 1980, c. 468.

[247] *Ibid.*, s. 1(*e*).

[248] *Ibid.*, s. 1(*f*).

[249] *Ibid.*, s. 18.

The life tenant or other limited owner in possession is also given the power "without any application to the court" to lease the settled estate for any term not exceeding twenty-one years, unless the settlement expressly denies the power.[252] The Act further provides that the court shall not make an order "beyond the extent to which, in the opinion of the court, the same might have been authorized in and by the settlement by the settlor".[253] This provision appears to imply that a court should not act contrary to the likely wishes of the settlor, although it is not clear[254] whether the provision is to the same effect as sections 68 and 69 of the Ontario *Trustee Act*, which specifically subordinate the provisions of that Act to a contrary intent expressed in the trust instrument.

Settled estates legislation was introduced in Ontario by *The Settled Estates Act, 1895*,[255] which was taken, in the main, from the English *Settled*

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[250] Section 18(1) of the Ontario *Settled Estates Act* permits "any person entitled to . . . the receipt of the rents and profits of a settled estate" to apply to the court. It appears, therefore, that an application under the Act may, in appropriate circumstances, be made by a person who is not a life tenant or other limited owner. For example, in *Vine v. Raleigh* (1883), 24 Ch. D. 238, the Court, in interpreting the equivalent provision contained in the English *Settled Estates Act, 1877*, 40 & 41 Vict., c. 18 (U.K.), held that, where an estate was vested in trustees and there was no beneficial owner of the rents and profits for the time being, the trustees, as persons entitled to collect the rents and profits, were persons who might apply to the court for a grant of a power conferred by the Act.

[251] See *Vine v. Raleigh*, *supra*, note 250.

[252] *Settled Estates Act*, *supra*, note 246, s. 32.

[253] *Ibid.*, s. 28.

[254] See, for example, *In re Currie and Watson's Trusts* (1904), 7 O.L.R. 701 (H.C.J.).

[255] 58 Vict., c. 20. Earlier Imperial legislation was in force in Ontario pursuant to *The Judicature Act*, R.S.O. 1887, c. 44, s. 32(1), which provided that the High Court should have the same jurisdiction as the Court of Chancery in England had on the 18th March, 1865, *inter alia*, "in regard to leases and sales of settled estates"; s. 32(2) and (5) also contained provisions regarding settled estates. Further, *An Act to amend the law respecting the Lease and Sale of Settled Estates* (1890), 53 Vict., c. 14, contained provisions regarding renewal clauses in leases of settled estates. Section 50 of the Act of 1895 amended s. 32 of *The Judicature Act*, R.S.O., 1887, by striking out the words of s. 32(1) just quoted, and by striking out s. 32(2) and (5). Section 50 also repealed (1890), 53 Vict., c. 14. See, generally, *Re Bishoprick* (1874), 21 Gr. 589, and *Re Watson's Trusts* (1892), 21 O.R. 528 (H.C.J.). The Imperial *Settled Estates Act, 1856*, 19 & 20 Vict., c. 120, has been held to be in force in Saskatchewan: see *Re Moffat Estate* (1955), 16 W.W.R. 314 (Sask. Q.B.).

Estates Act, 1877.[256] The Ontario legislation was intended to enable the court to authorize such powers to be exercised "as were ordinarily inserted in a well-drawn settlement".[257] It is of interest to note that, while the English Act of 1877 was superseded five years later by the *Settled Land Act, 1882*,[258] and was further refined by the *Settled Land Act, 1925*,[259] the present English legislation, these developments were never adopted in Ontario. As the Ontario *Settled Estates Act* originated from English legislation, it may be instructive, in order to understand the purpose of the Act, to consider briefly the history of the legislation in England.

b. England

In England, by the nineteenth century, nearly all large landholdings of the upper classes were held in "strict settlement". This form of settlement was designed to keep the ancestral home and property intact and within the family for succeeding generations, and while this purpose was achieved, other, often adverse, consequences were created. Specifically, as we have mentioned,[260] at common law a life tenant in possession could alienate his own life estate, but no more. He could not sell or mortgage the fee simple estate in even a part of the land, no matter how financially advantageous that might have been. Moreover, traditionally, settlors either conferred inadequate management powers upon the life tenant, or withheld such powers entirely. Although this was sometimes the result of inadvertence or poor drafting, more often it was due to the settlor's apprehension that, if extensive powers were conferred, the land, the subject matter of the settlement, might be sold or partitioned, thereby destroying the purpose of the settlement. By the mid-nineteenth century, it was becoming apparent that many life tenants had neither the funds nor the powers to manage their estates adequately.

As a result of this position, legislation intervened.[261] Between 1840 and 1877 a series of statutes empowered the Court of Chancery to confer upon the life tenant or other limited owner in possession various powers to improve settled land, involving such matters as drainage, fencing, building, and road-making.[262] The *Settled Estates Act, 1877*[263] granted to the Court of Chancery more extensive powers with respect to both common law settlements and settlements of land by way of trust and, as we have noted, this statute provided the model for Ontario's current *Settled Estates Act*. The English 1877 Act was superseded in 1882 by the *Settled Land Act, 1882*,[264] which departed significantly from past practice by conferring directly upon the life tenant, without leave of the court, extensive powers of sale, exchange, partition, and leasing. The life tenant of settled land thus acquired a freedom of disposition that was comparable to that of an absolute owner. As part of the general reform of property law in England in 1925, the 1882 Act was replaced by the *Settled Land Act, 1925*,[265] which continues the policy of the 1882 Act in a more direct form, by vesting the legal estate in fee simple absolute in possession in the tenant for life or other limited owner. In the result, as the legal estate and the statutory powers are vested in the person entitled in equity to a life or other limited interest, the Act does not apply to settlements of land where the legal estate is vested in trustees.[266]

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[256] *Supra*, note 250.

[257] *Re Hooper* (1896), 28 O.R. 179 (H.C.J.), at 181, *per* Meredith C.J., citing Macnaghten L.J. in *Lord Henry Bruce v. Marquess of Ailesbury*, [1892] A.C. 356 (H.L.).

[258] *Settled Land Act, 1882*, 45 & 46 Vict., c. 38 (U.K.).

[259] *Settled Land Act, 1925*, 15 & 16 Geo. 5, c. 18 (U.K.).

[260] See *supra*, this ch., sec. 3(b)(ii)a.

[261] For an account of the history of the strict settlement legislation, see Underhill, "Changes in the Law of Real Property", in *A Century of Law Reform* (1901), at 280-97; Megarry and Wade, *The Law of Real Property* (4th ed., 1975), ch. 6; and Burn (ed.), *Cheshire's Modern Law of Real Property* (12th ed., 1976), at 166-69.

[262] *Settled Estates Drainage Act, 1840*, 3 & 4 Vict., c. 55 (U.K.); *The Land Drainage Act, 1845*, 8 & 9 Vict., c. 56 (U.K.); *Settled Estates Act, 1856*, 19 & 20 Vict., c. 120; *Settled Estates Act, 1858*, 21 & 22 Vict., c. 77 (U.K.); and *Settled Estates Act, 1864*, 27 & 28 Vict., c. 45 (U.K.).

[263] *Supra*, note 250.

c. *Other Canadian Jurisdictions*

The experience of other Canadian provinces and territories with the English settlement legislation may be briefly mentioned. British Columbia adopted settled estates legislation similar to the 1877 English Act, and this legislation remains in force today.[267] New Brunswick's *Trustees Act*[268] confers upon the trustees of settled land, with the concurrence of the life tenant, the power to sell, exchange, or join in the partition of the land. Apart from these jurisdictions, none of the other provinces, other than Ontario, whose legislation we discussed earlier,[269] has a Settled Estates Act or equivalent provision. However, it has been held in Nova Scotia that the wording of the *Judicature Act* confers upon the Supreme Court of the Province the powers granted to the English Court of Chancery by the *Settled Estates Act, 1877*.[270] It is possible that a similar argument, or an argument based upon the reception of English law, could be made also with respect to other provinces that have not enacted settled estates legislation.[271]

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[264] *Supra*, note 258.

[265] *Supra*, note 259.

[266] In 1884, Parliament partially excluded the "trader's trust", the popular trust for sale, from the provisions of the *Settled Land Act, 1882*. The *Settled Land Act, 1884*, 47 & 48 Vict., c. 18, s. 6(1) (U.K.), provided that, in the case of a trust for sale, the tenant for life could not exercise the powers of the *Settled Land Act, 1882*, unless an order of the court had been obtained, and pending such order, the Act further provided, trustees could sell the land without the consent of the tenant for life. However, the 1884 legislation only conferred the power of sale on trustees, and did not grant to trustees other powers of management in respect of land held on a trust for sale. These powers remained with the tenant for life. The process of excluding land held on a trust for sale from settled land legislation was completed in 1925. The *Settled Land Act, 1925*, *supra*, note 259, s. 1(7), provides that a settlement does not include land held upon trust for sale, and, under English law, land held upon a trust for sale is governed not by the *Settled Land Act, 1925*, but rather by the *Law of Property Act, 1925*, 15 & 16 Geo. 5, c. 20 (U.K.) and by the *Trustee Act, 1925*, *supra*, note 31.

[267] *Land (Settled Estate) Act*, R.S.B.C. 1979, c. 215.

[268] *Supra*, note 58, ss. 44-48.

[269] See *supra*, this ch., sec. 3(b)(ii)a.

[270] *Re Baugild*, [1954] 3 D.L.R. 586 (N.S.S.C.).

d. Other Commonwealth Jurisdictions

The English settled estates legislation was adopted in all the states of Australia and in New Zealand. As in Ontario, the present legislation in New South Wales[272] and South Australia[273] is essentially the same as the 1877 English Act. The present Tasmanian Act[274] is closer to the English *Settled Land Act, 1882*, and Victoria's *Settled Land Act, 1958*[275] is more akin to the English *Settled Land Act, 1925*. The revision of the New Zealand *Trustee Act*[276] in 1956 was accompanied by the repeal of its settled land legislation, and Western Australia followed a similar course when it enacted the *Trustees Act, 1962*.[277] Similarly, when Queensland enacted the *Trusts Act 1973*[278] it repealed its *Settled Land Act* of 1886. Although the trustee legislation of New Zealand, Western Australia, and Queensland differs somewhat, these jurisdictions confer upon trustees in respect of any trust property vested in them, including land, the powers of sale, exchange, partition, and lease.

Despite the repeal of the settled land legislation in Western Australia, Queensland, and New Zealand, their Trustee Acts contain two provisions that reflect settled land concepts. The first, which occurs only in the Western Australia legislation, requires trustees to sell land subject to a trust, if the person or all the persons beneficially entitled to an interest in possession express the desire in writing that they do so.[279] This means that, in this context, trustees can be directed as to the exercise of their powers. The second provision, to be found in the Acts of all three jurisdictions, is to the effect that, where there is no trustee of any land, but there is a life tenant, or other person with an interest less than an estate in fee simple in possession, that person may exercise all the powers conferred by the trustee legislation upon trustees.[280] This provision is intended to deal with the rare situation where successive interests in land are created without the imposition of a trust.

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[271] *Re Moffat Estate*, *supra*, note 255.

[272] *Conveyancing and Law of Property Act, 1898*, Pub. Acts N.S.W. 1824-1957, Vol. 2, No. 17, Part IV.

[273] *The Settled Estates Act, 1880*, Stat. S. Austl. 1837-1936, No. 182.

[274] *Settled Land Act 1884*, Stat. Tasm. 1826-1959, No. 10.

[275] Acts Vict. 1958, Vol. 7, No. 6367.

[276] *Supra*, note 227, s. 89(1). This Act repealed the *Settled Land Act 1908*, Repr. Stat. N.Z. 1931, Vol. 8, No. 175.

[277] *Supra*, note 95, s. 4(1). This Act repealed the *Settled Land Act, 1892*, 55 Vict., No. 10.

[278] *Supra*, note 229, s. 3(1). This Act repealed the *Settled Land Act 1886*, 50 Vict., No. 13.

[279] *Trustees Act, 1962*, *supra*, note 95, s. 27(4).

[280] *Ibid.*, s. 109; New Zealand *Trustee Act 1956*, *supra*, note 227, s. 88; and Queensland *Trusts Act 1973*, *supra*, note 229, s. 6(a).

(c) General Proposals for Reform

Having reviewed briefly the present position in Ontario and elsewhere, two questions arise for consideration. The first is whether trustee administrative powers should continue to be the subject matter of legislation. If an affirmative answer is given to this question, the second question that must be answered is whether, in settlements of land by way of trust, administrative powers should continue to be located in the Ontario *Settled Estates Act* and should continue to be conferred upon the tenant for life or other limited owner, as now occurs under this Act.

As to the first question, the Commission is aware that it is standard practice in Ontario for practitioners to include in trust instruments all the powers that trustees will need, or seem likely to need, during the lifetime of the trust. Such a practice permits the powers in question to be tailored to the particular objects of the trust. Also, it may be said that it is convenient, especially for non-professional trustees, to have an exhaustive list of administrative powers contained in the trust instrument to which they have ready access. Further, it may be argued that certain types of power may relate to a subject matter that is inappropriate for legislation. This is especially true of the important powers that relate to the operation of the federal *Income Tax Act*,[281] and that are usually tailor-made for particular tax situations. It is doubtful whether there are standard powers across the Province in this area of the law, and experience has shown that such powers have to be revised frequently due to changes in the tax laws. As taxation considerations affect many other powers conferred upon trustees,[282] it is contended that these other powers would also be subject to constant review and amendment. Moreover, dealing with situations where powers conferred by the trust instrument prove to be inadequate, those who do not favour the inclusion in the revised Act of administrative powers point to the growing tendency to supplement the inherent jurisdiction of the court by legislation that authorizes the court to confer upon trustees any power thought to be necessary.[283]

On the other hand, the inclusion of administrative powers in trustee legislation was intended, from the beginning, to benefit trustees and their beneficiaries whose trust instruments did not contain a power commonly inserted. If a settlor or testator omitted a power later found to be essential, no recourse was available, unless it could be demonstrated that an emergency situation existed that justified invoking the inherent jurisdiction of the court. To meet this situation, it became the legislative practice to provide that familiar powers should be read into trust instruments, unless the settlor or testator had expressly or impliedly excluded or modified their operation.

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[281] *Income Tax Act*, S.C. 1970-71-72, c. 63.

[282] For example, the power of trustees to make a joint election with any preferred beneficiary as to the tax treatment of that beneficiary's interest.

[283] See, for example, the English *Trustee Act, 1925*, *supra*, note 31, s. 57; Alberta *Trustee Act*, *supra*, note 225, s. 21; Manitoba *Trustee Act*, *supra*, note 175, s. 60; New Brunswick *Trustees Act*, *supra*, note 58, s. 25; Nova Scotia *Trustee Act*, *supra*, note 225, s. 50; Northwest Territories *Trustee Ordinance*, *supra*, note 59, s. 20; and Yukon *Trustee Ordinance*, *supra*, note 60, s. 23.

Furthermore, although the jurisdiction of the court to confer additional administrative powers upon trustees has been expanded by statute in some jurisdictions,[284] it is questionable whether judicial intervention should be the only means by which trustees can seek assistance. Court application involves cost, time loss, and inconvenience to the trust, and it may be argued that in many instances statutory powers could obviate the necessity of court application when usual administrative powers have been omitted from the trust instrument.

In considering these competing arguments, the Commission notes that trusts drafted today are very different from those that were drawn when the powers contained in the present Ontario *Trustee Act* were first included in the Act, and that as a result some of the powers now contained in the Act have little relevance to contemporary circumstances. Moreover, the fact that these statutory powers have not been revised for so long, without apparent complaint from the profession, suggests that this area is not one that is urgently in need of attention. Nevertheless, although these arguments have merit, the Commission has had little difficulty in concluding that it would be useful for the revised Act to contain a set of administrative powers that are customary in well-drawn contemporary trust instruments, and we so recommend. We further recommend that the settlor or testator should be able to exclude or modify any of the statutory administrative powers conferred upon trustees.[285] It will also be noted that the administrative powers contained in the Ontario *Trustee Act* are scattered throughout the Act, and we recommend that the current arbitrary placement of powers should be replaced by a thematic list in the revised Act.

The second question that arises concerns the position where there is a settlement of land by way of trust. It will be recalled that, where land stands limited in trust for any persons by way of succession, administrative powers are located in the Ontario *Settled Estates Act*, and the court is authorized to confer these powers upon the life tenant or other limited owner in possession.[286] The question that the Commission has considered is whether a settlement of land by way of trust should continue to be subject to this distinct treatment. There are, in the opinion of the Commission, two possible approaches: first, to continue the present scheme of the *Settled Estates Act* with a modernized list of powers; or secondly, to repeal the Act so far as it relates to settlements of land by way of trust, and to render the administrative powers in the revised Act applicable to all trusts, including trusts of this nature.

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[284] *Ibid.*

[285] Draft Bill, ss. 35 and 2(*b*). Consistent with our view expressed in Chapter 1 that the revised Act should contain supportive and facultative powers, we have not been persuaded that any statutory administrative power should be exercisable by trustees whether or not a contrary intent is expressed in the trust instrument. This is the policy of the Queensland *Trusts Act 1973*, *supra*, note 229, which provides in s. 31(1) that, except when otherwise provided, the statutory administrative powers contained in Part IV of the Act shall apply whether or not a contrary intention is expressed in the instrument creating the trust. In only a few instances is the instrument allowed to exclude the statutory powers.

[286] See *supra*, sec. 3(b)(ii)a.

The Commission has had little difficulty in concluding that the latter of these options is the more appropriate policy to adopt. From a practical aspect, we are of the view that the continued distinction between settlements of land by way of trust and all other trusts cannot be justified in Ontario today. Our primary reason, however, for concluding that administrative powers for all trusts, including settlements of land by way of trust, should be subject to the revised *Trustee Act* is that we are of the opinion that the policy of conferring powers of management and administration upon a life tenant or other limited owner in possession is no longer appropriate. Rather, we consider that administrative powers in relation to all trusts should be conferred directly upon trustees. Indeed, where there is a trust of mixed assets, the conferment of administrative powers in relation to land upon the life tenant, rather than upon the trustees, only serves to complicate the task of administering the trust as a whole. In such a case, it is also probably fair to say that separation of administrative powers would not normally be desired by a testator or settlor, who would have selected as trustees persons whom he believed to be the most competent to manage his entire estate.

Accordingly, the Commission recommends that, where land is settled on trust for successive beneficiaries, the powers of management and administration should not be conferred upon the life tenant or other limited owner in possession. Rather, the revised Act should confer such powers directly upon the trustees, in order that they may exercise necessary administrative powers for all trust assets.[287]

We would point out that this recommendation does not necessarily exclude the life tenant or other limited owner in possession from participating in the administration of the trust. If any settlor or testator wishes such a person to exercise certain administrative powers, this could, in accordance with our earlier recommendation,[288] be stated in the trust instrument. Further, the creator of the trust could appoint the life tenant to be the sole trustee, or one of two or more trustees. In the latter case, the retention of the unanimity rule, which we have recommended,[289] would mean that the life tenant, by withholding his consent from the proposed exercise of an administrative power with which he did not agree, could preclude the exercise of the power.

As we have mentioned, the Ontario *Settled Estates Act* applies where land stands limited "to" or "in trust for" persons by way of succession; that is, it applies both to common law settlements of land and to settlements of land by way of trust. The implementation of the above recommendation could be accomplished by amending the Ontario *Settled Estates Act* so as to restrict its application to common law settlements and by rendering the revised Act applicable to all trusts, including settlements of land by way of trust. Unlike the position in England,[290] it is still possible in Ontario, although rare, to create successive legal interests without the imposition of a trust, and, in such circumstances, the provisions of the Ontario *Settled Estates Act* are necessary to confer administrative powers upon the life tenant or other limited owner in possession.[291] Therefore, the complete repeal of the *Settled Estates Act* would leave a void that would not be filled by our earlier recommendation.

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[287] Draft Bill, s. 35, and s. 2(*a*), which makes the provisions of the revised Act applicable to all trusts, unless otherwise provided in the Act.

[288] See *supra*, this sec., and Draft Bill, s. 2(*b*).

[289] See *supra*, ch. 2, sec. 5.

[290] Since the *Law of Property Act, 1925*, *supra*, note 266, it has no longer been possible to create successive legal interests in land in England.

We are aware that, as noted previously, Western Australia,[292] Queensland,[293] and New Zealand[294] have addressed this issue by inserting in their trustee legislation a provision that enables a life tenant, or other person with an interest less than a fee simple, to exercise all the powers conferred upon trustees by that legislation. The Commission has concluded, however, that the revised Act should not contain such a provision. Rather, we are of the view that it would be more appropriate to deal with the common law settlement of land in the context of a comprehensive review of land law. Accordingly, we recommend that the *Settled Estates Act* should be amended so as to exclude from its operation settlements of land by way of trust. We further recommend that that Act, insofar as it confers administrative powers in relation to common law settlements of land, should remain in force, pending a review of the basic principles of land law.[295]

(d) SPECIFIC ADMINISTRATIVE POWERS

Having recommended that the revised Act should continue to contain trustee administrative powers, we now turn our attention to the specific powers that should be included. In making this determination, we have followed two basic principles. First, we believe that the statutory list should comprehend those administrative powers that are likely to be useful in the execution of common trusts. Secondly, we consider that each power should be relatively simple in concept and briefly expressed. As we have recommended that the creator of the trust should be free to exclude, modify, or add to any of the proposed statutory powers, draftsmen who prefer to use their own administrative powers need not be concerned with the revised Act.

To ensure that the proposed list of statutory powers is comprehensive, we have considered powers that are commonly contained in trust instruments in Ontario. In addition, we have reviewed the trustee legislation of other Canadian jurisdictions, of New Zealand, Western Australia, and Queensland, and we have considered the American Uniform Trustees' Powers Act. The model that we have found most useful for our purposes is that contained in the American Uniform Act, and our proposed statutory list bears the influence of this Act.

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[291] As has been pointed out in *Chupryk v. Haykowski*, [1980] 4 W.W.R. 534 (Man. C.A.), in the absence of settled estates legislation, the courts have no jurisdiction to authorize the exercise of an administrative power by the life tenant when settlements of land otherwise than by way of trust are involved, that is, unless the inherent jurisdiction of the court, which is limited to affording relief in situations of emergencies, can be invoked.

[292] *Trustees Act, 1962*, *supra*, note 95, s. 109.

[293] *Trusts Act 1973*, *supra*, note 229, s. 6(a).

[294] *Trustee Act 1956*, *supra*, note 227, s. 88.

[295] The Commission has on its agenda a project on Basic Principles of Land Law, which will deal with this topic in greater detail.

However, it will be noted that we have omitted certain administrative powers from our statutory list. First, the powers to allocate or apportion receipts and expenses between capital and income beneficiaries,[296] and to employ agents,[297] are not discussed in this part of the Report. We are of the view that these complex topics should be dealt with separately and, accordingly, have afforded them distinct treatment in this Report and our Draft Bill. Further, we have decided to exclude from our statutory list other administrative powers which, although often found in trust instruments, contemplate action somewhat removed from the traditional functions of trustees. Provisions of this nature include the following powers: to lend money, except as authorized for the purposes of investment; to give guarantees; to take out life insurance; and, as a general power, to incorporate companies. We have also omitted from our proposed statutory list powers that would authorize acts pursuant to the *Income Tax Act* (Canada); for example, the familiar and important power of trustees to make a joint election with any "preferred beneficiary" as to the tax treatment of that beneficiary's interest. It is evident to us that such powers require that the creator of the trust should have given thought to their appropriateness and scope.

As indicated, in formulating our list of statutory powers, the second basic principle that we have followed is that each power should be relatively simple in concept and briefly expressed. In our opinion, complex and verbose administrative powers would invite literal judicial interpretation. Courts would be encouraged not infrequently to read statutory language strictly, and to hold that any act not expressly specified as included in the power would necessarily be excluded. Very detailed statutory powers would also invite amendments by the legislature should gaps in language be exposed, and, should amendment not be forthcoming, draftsmen might conclude that the statutory power should be modified by the instrument, if indeed it was to be employed at all.

As we have stated, our proposed statutory list reflects the influence of the American Uniform Trustees' Powers Act. We have been impressed by the Act's simplicity and brevity of expression, although we have been careful to avoid the mechanical adoption of terminology and concepts not familiar to Ontario. Although we are aware that it might be thought desirable, we do not consider it necessary to detail exhaustively every aspect of what trustees may properly do in the exercise of each power. In our view, the general duty of care imposed upon trustees can be relied upon to curtail the extravagant exercise of administrative powers by trustees. Accordingly, we recommend that the revised Act should provide expressly that the exercise of the listed statutory administrative powers should be subject to the duty of care, diligence, and skill that a person of ordinary prudence would exercise in dealing with the property of another person,[298] a duty that we have recommended should be placed in statutory form and made applicable to the discharge and exercise of all a trustee's duties and powers.[299]

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[296] See *infra*, this ch., sec. 4.

[297] See *supra*, ch. 2, sec. 3.

[298] Draft Bill, ss. 35 and 4.

We now turn to discuss the specific powers that we recommend should be included in the revised Act.

(i) Deposit of Trust Funds

Section 28 of the Ontario *Trustee Act* enables trustees to deposit trust money in banking institutions, and provides as follows:

> 28. A trustee may, pending the investment of any trust money, deposit it during such time as is reasonable in the circumstances in any chartered bank of Canada, or in the Province of Ontario Savings Office, or in any trust company or loan corporation that is registered under the *Loan and Trust Corporations Act*, or in any credit union as defined in the *Credit Unions and Caisses Populaires Act*.

It will be noted that section 28 applies only to the deposit of trust funds pending investment of those funds. We are of the opinion that trustees should be able to deposit funds so far as is necessary for the purpose of operating a current account. This would be a temporary deposit, and would assist trustees with their cash-flow. We would rely upon the general duty of care to prevent trustees from holding large sums in a current account unnecessarily or from keeping funds on deposit for an unreasonable period of time. Accordingly, we recommend that the revised Act should provide that trustees may, pending investment, or for the purposes of paying the ongoing expenses of the trust, deposit trust money in a chartered bank, trust company, or any other depository empowered by law to accept moneys for deposit.[300]

(ii) Power of Sale

At present, the Ontario *Trustee Act* does not confer upon trustees a power of sale, although the Act does contain a provision respecting the mode of sale, if a power of sale otherwise exists. Section 17 of the Act provides as follows:

> 17. Subject to the *Estates Administration Act*, where a trust for sale or a power of sale of land or personal estate is vested in a trustee he may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract subject to such conditions respecting title or evidence of title or other matter as the trustee thinks fit, with power to vary any contract for sale, and to

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[299] See *supra*, ch. 2, sec. 2.

[300] Draft Bill, s. 35(*a*). Regarding the institutions in which trust funds may be deposited, it will be recalled that the American Uniform Trustees' Powers Act permits a trustee, without the consent of the court, to deposit trust funds in a bank, including a bank operated by the trustee: see *supra*, this ch., sec. 3(b)(i)d. At this juncture, we would point out that we agree in principle with this provision. The range of issues involved where a trustee's interest may conflict with his duty, including this situation in particular, has been canvassed in greater detail *supra*, ch. 2, sec. 4.

> buy in at any auction, or to rescind any contract for sale and to resell, without being answerable for any loss.

A power of sale may arise either expressly or by implication. An express power of sale arises where the creator of the trust vests certain assets in his trustees and, in relation to these assets, confers upon trustees a power of sale, or a power to sell or retain at their discretion.[301] Secondly, where the trust instrument is silent, trustees have an implied power of sale, established by case law, in those circumstances where their duty to maintain an even hand between income and capital beneficiaries necessitates that they sell wasting, hazardous, or speculative assets, or assets that unduly favour capital beneficiaries.[302] In addition, a power of sale may be implied to enable trustees to carry out the powers conferred upon them by the trust instrument or by trustee legislation, for example, the power of investment. It seems to be only in those instances where the trust instrument expressly or by construction imposes upon trustees a duty to retain assets that a power of sale is precluded.

The Commission is of the view that the effective management of a trust requires that trustees should possess the power to sell trust assets, unless such a power is excluded or modified by the trust instrument. Indeed, the trustee legislation of Queensland,[303] Western Australia,[304] and New Zealand,[305] as well as the American Uniform Trustees' Powers Act,[306] contain a provision empowering trustees to sell trust property. Further, while we would carry over to the revised Act the mode of sale by private contract or public auction, we would include a feature that is not present in section 17 of the Ontario Act. We would permit trustees to sell trust property for credit on appropriate security, an authority that we understand to be commonly inserted in trust instruments in this Province. Accordingly, we recommend that the revised Act should provide that trustees may sell trust property by public auction or private contract for cash or credit on appropriate security.[307]

Before leaving this topic, we wish to note one other section of the present *Trustee Act* that deals with the power of sale, namely, the power of the Court to order a sale of land held by trustees for charitable purposes. Section 15 of the Act provides as follows:

> 15.—(1) Where land is held by trustees for a charitable purpose and it is made to appear that the land can be no longer advantageously used for such charitable purpose or that for any other reason the land ought to be sold, a judge of the Supreme Court may make an order authorizing the sale thereof and may give

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[301] An express statutory power of sale also arises under the *Estates Administration Act*, R.S.O. 1980, c. 143, s. 2, whereby executors, as trustees, may sell property for the purpose of paying the debts of the deceased testator.

[302] See *Re Smith*, *supra*, note 9. See, generally, Waters, *supra*, note 8, at 745-49.

[303] *Trusts Act 1973*, *supra*, note 229, ss. 32(1)(a), 34, 35, 36, and 37.

[304] *Trustees Act, 1962*, *supra*, note 95, ss. 27(1)(a), 31, 32, 33, and 34.

[305] *Trustee Act 1956*, *supra*, note 227, ss. 14(1)(a), 16, 17, and 18.

[306] American Uniform Act, *supra*, note 233, § 3(c)(7).

[307] Draft Bill, s. 35(*b*).

such directions in relation thereto and for securing the due investment and application of the money arising from the sale as may be considered proper.

(2) No such order shall be made unless notice of the application has been given to the Public Trustee.

Although, as stated in chapter 1, we are of the view that the revised Act should not apply generally to charitable trusts, except insofar as concerns the matters that we shall discuss in chapter 8, nevertheless section 15 of the present Act appears to be a useful provision. Because the land is held by the trustees for charitable purposes, and therefore involves the public interest, there is justification for requiring the court to authorize any sale of the land and for the requirement that the Public Trustee be notified. Accordingly, we would retain section 15 in the revised Act, and recommend that, where land is held by trustees for a charitable purpose and it appears that the land can be no longer advantageously used for such charitable purpose or that for any other reason the land ought to be sold, the court should be empowered to authorize its sale and give such directions in relation to the sale and for securing the due investment and application of the money arising from the sale as are appropriate.[308] In addition, we recommend that no order should be made by the court under the above recommendation unless notice has been given to the Public Trustee.[309]

(iii) Exchange and Partition

The Ontario *Trustee Act* contains no provision that would allow trustees to dispose of trust property by way of exchange, or to concur in the partition of the trust property. Such powers are to be found, for example, in the trustee legislation of New Zealand,[310] Western Australia,[311] and Queensland,[312] and in the American Uniform Act.[313] We are of the view that the ability to dispose of trust property by way of exchange is a useful alternative to the power of sale, and that a trustee should also be entitled to consent to a partition of property in which the trust holds an undivided share. The New Zealand, Queensland, and Western Australia Acts also stipulate that the property received in exchange must be of a "like nature and a like or better tenure". However, we are of the opinion that the nature of property received in exchange need not be so stipulated; in our view, the trustee's general duty of prudence is adequate to safeguard the interests of the trust. Accordingly, we recommend that the revised Act should contain a provision to the effect that trustees may dispose of trust property by way of exchange for other property, or, where the trust property consists of an undivided share, concur in the partition of the property in which the share is held.[314]

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[308] *Ibid.*, s. 79. For an additional power in the Public Trustee to sell land held for a charitable purpose in specified circumstances, see the *Charities Accounting Amendment Act, 1982*, S.O. 1982, c. 11, s. 1.

[309] *Ibid.*, s. 80.

[310] *Trustee Act 1956*, *supra*, note 227, s. 14(1)(b).

[311] *Trustees Act, 1962*, *supra*, note 95, s. 27(1)(b).

[312] *Trusts Act 1973*, *supra*, note 229, s. 32(1)(b).

[313] American Uniform Act, *supra*, note 233, § 3(c)(7).

(iv) Power to Lease

The Ontario *Trustee Act* authorizes trustees, where trust assets include leasehold property, to renew the lease and, for that purpose, to raise money by way of a mortgage of the lease.[315] We are of the view that a general power to renew leases held by the trust should be carried over to the revised Act. Accordingly, we recommend that trustees, as lessees, should be able to renew a lease held by the trust.[316]

The present Act, however, contains no provision authorizing trustees to grant a lease of trust property. If the trust property in question comprises a "settled estate" within the meaning of the Ontario *Settled Estates Act*, the Act, as we have noted, confers upon the life tenant or other limited owner in possession the power to apply to the court for a grant of administrative powers, including the power to lease. The Act further confers on these parties the power, without any such application, to lease the settled estate, or any part thereof, for any term not exceeding twenty-one years.[317] In our earlier discussion of the *Settled Estates Act*, we recommended that, where land is settled by way of trust, the powers of administration and management should be conferred directly upon the trustees.

We are of the view that the revised Act should empower trustees to grant or renew a lease of any trust property.[318] However, we do not consider that trustees should be granted complete discretion in this regard, as beneficiaries might be seriously affected if, for example, trustees were to grant a lease of ninety-nine years, or if, for example, a lease granted by trustees was to contain an option to renew the lease or to purchase the reversion. Accordingly, we would limit the scope of the statutory power to leases that do not contain an option to renew or purchase, and to leases that provide for the grant of a term not exceeding three years in the case of a residential lease, and seven years in the case of any other lease. If a longer term is thought to be desirable, or if it is wished to include in the lease an option to renew or to purchase the reversion, the trustees should seek the consent of the court. We recommend, therefore, that the revised Act should contain a provision to the effect that trustees may, as lessors, grant or renew a lease or sublease of trust property for a term not exceeding, in the case of residential property, three years, or, in the case of any other type of property, seven years, or with the consent of the court, grant or renew a lease or sublease of trust property for longer periods or grant an option to renew the lease or sublease or to purchase the reversion.[319]

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[314] Draft Bill, s. 35(*c*).

[315] *Trustee Act*, *supra*, note 6, s. 22.

[316] Draft Bill, s. 35(*d*).

[317] *Settled Estates Act*, *supra*, note 246, s. 32. See, also, *supra*, this ch., sec. 3(b)(ii)a.

[318] A power to lease is also contained in the Western Australia *Trustees Act, 1962*, *supra*, note 95, s. 27(1)(d), (e), (f), (2), and (3); the New Zealand *Trustee Act 1956*, *supra*, note 227, s. 14(1)(d), (e), and (f); the Queensland *Trusts Act 1973*, *supra*, note 229, s. 32(1)(d), (e), (f), (2), and (3); and the American Uniform Act, *supra*, note 233, § 3(c)(10).

(v) Power to Maintain and Repair

The Ontario *Trustee Act* contains no provision that authorizes trustees, in a general manner, to maintain, repair, improve, or develop trust property, although section 19 of the Act does contain a specific power enabling trustees to dedicate or sell land for municipal highway purposes. The American Uniform Act,[320] and the New Zealand,[321] Western Australia,[322] and Queensland[323] Acts, on the other hand, do contain such powers. The Commission is of the view that a general power permitting trustees to manage, maintain, repair, renovate, improve, or develop trust property is useful, if not essential. However, unlike the situation under the New Zealand, Western Australia, and Queensland legislation, we do not propose the imposition of pecuniary limits upon the cost of any such repairs or improvements; rather, we prefer to leave this matter to be controlled by the trustee's duty of prudence. Accordingly, we recommend that the revised Act should provide that trustees may manage, maintain, repair, renovate, improve, or develop trust property, including in the case of land subdividing, erecting buildings, dedicating for any public purpose, granting easements, *profits à pendre*, or licences, and entering into agreements with respect to boundaries, party walls, fencing, or other matters in connection with trust property.[324]

(vi) Power to Insure

Section 21 of the Ontario *Trustee Act* confers upon trustees a power to insure trust property, and provides, in part,[325] as follows:

> 21.—(1) A trustee may insure against loss or damage by fire, tempest or other casualty, any building or other insurable property to any amount, including the amount of any insurance already on foot, not exceeding three-fourths of the value of such building or property, . . .
>
> (2) This section does not apply to any building or property that a trustee is bound forthwith to convey absolutely to any beneficiary upon being requested to do so.

It will be noted that the section is limited to insurance in respect of "loss or damage" to the trust property, and that the property may be insured to any amount not exceeding three-fourths of the value of the property.

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[319] Draft Bill, s. 35(*e*).

[320] American Uniform Act, *supra*, note 233, § 3(c)(8) and (9).

[321] *Trustee Act 1956*, *supra*, note 227, s. 15(1)(a), (b), (c), and (e).

[322] *Trustees Act, 1962*, *supra*, note 95, s. 30(1)(a), (b), (c), and (f).

[323] *Trusts Act 1973*, *supra*, note 229, s. 33(1)(a), (b), (c), (e), (f), and (h).

[324] Draft Bill, s. 35(*f*).

[325] The section further authorizes the payment of premiums out of the income of trust property, a power that we will examine in greater detail, *infra*, this ch., sec. 4(b).

In general, it may be argued that there is no need to include in the revised Act a specific power to insure, as the duty to insure in appropriate cases forms part of the general duty of trustees to preserve the trust assets.[326] However, this duty is not incontrovertibly established, and, in view of the customary inclusion of this power in trust instruments, it seems wise to include it in the statutory list. As with all the statutory powers, the exercise of the power to insure would be subject to the general duty of care and prudence, which would govern when, and the manner in which, trust property is insured. While we consider that section 21 provides a useful model, in our view the provision should be altered in two respects. First, in accordance with equivalent provisions in the legislation of New Zealand,[327] Western Australia,[328] Queensland,[329] and in the American Uniform Act,[330] we are of the view that the proposed power to insure should permit trustees to obtain liability insurance, as well as insurance for "loss or damage" to the trust property. Secondly, again in accordance with these four Acts, we have concluded that the limitation of insurance coverage to three-quarters of the value of the property should not be carried over to the revised Act. Rather, this power of trustees should be stated in unqualified form. Accordingly, we recommend that the revised Act should provide that trustees may insure against loss or damage to trust property and against any other risk or liability.[331]

(vii) Power to Carry on a Business

Assume that, when a trust takes effect, the trust assets include a business. At present, there is no express provision in the Ontario *Trustee Act* that enables the trustees to carry on the business. Moreover, unless it can be said that a business constitutes an investment, so that trustees can carry it on under the power of investment, there is doubt whether a general power in the instrument to postpone sale authorizes trustees so to act.[332] Since an express power to carry on a business is very familiar in contemporary trust instruments, and is also contained in the trustee legislation of several jurisdictions,[333] we are of the view that the revised Act should similarly include such a useful provision. Accordingly, we recommend that the revised Act should contain a provision to the effect that trustees may carry on any business, whether as sole proprietor, partner, limited partner or otherwise, and may incorporate or otherwise change the form of the business, and dispose of or wind up the business.[334]

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[326] See *Re Gamble* (1925), 57 O.L.R. 504, [1925] 4 D.L.R. 768 (Ont. H.C. Div.).

[327] *Trustee Act 1956*, *supra*, note 227, s. 24.

[328] *Trustees Act, 1962*, *supra*, note 95, s. 46.

[329] *Trusts Act 1973*, *supra*, note 229, s. 47.

[330] American Uniform Act, *supra*, note 233, § 3(c)(17).

[331] Draft Bill, s. 35(*g*).

[332] See Meagher and Gummow, *supra*, note 93, at 455-56.

[333] See, for example, the American Uniform Act, *supra*, note 233, § 3(c)(3); New Zealand *Trustee Act 1956*, *supra*, note 227, ss. 32 and 33; Western Australia *Trustees Act, 1962*, *supra*, note 95, ss. 55 and 56; and Queensland *Trusts Act 1973*, *supra*, note 229, ss. 57 and 58.

(viii) Shareholding Obligations

The Ontario *Trustee Act* does not directly confer upon trustees the ability to exercise the rights and powers attendant upon the ownership of shares of a corporation. It may be argued that as trustees are vested with the legal title to shares and are registered as owners of the shares, they should, by virtue of applicable company legislation, be entitled to exercise the powers of a shareholder. However, it is not clear whether this is the case in the absence of an express provision in the trust instrument or statute to that effect.

In the opinion of the Commission, trustees should be able to exercise all the rights and powers attendant upon shareholding; trustees should not be in a position where they cannot vote on matters that vitally affect the trust. The New Zealand,[335] Western Australia,[336] and Queensland[337] trustee legislation, as well as the American Uniform Act,[338] confer upon trustees the necessary powers to administer corporate securities properly. We agree with this approach and, accordingly, recommend that the revised Act should contain a provision to the effect that trustees may exercise all rights and powers and satisfy all liabilities incidental to the ownership of shares or obligations of a corporation, including power to sell or exercise subscription rights, to exchange the shares or obligations for other shares or obligations, to join in plans for reconstruction, reorganization or amalgamation, to enter into pooling or other agreements, and to authorize the sale of the assets or undertaking of the corporation.[339]

(ix) Surrender of Property

Although, pursuant to their duty to hold an even hand between beneficiaries, trustees are obliged to sell a wasting or hazardous asset, it is questionable whether this duty enables trustees to surrender trust property, even where the property is of such a nature that its retention would not be in the interests of the beneficiaries, for example, insurance policies for which there is insufficient money available for the payment of premiums, or leasehold property that is subject to onerous covenants. Certainly, no express power of surrender is to be found in the Ontario *Trustee Act*. We are of the view that an appropriately drafted power of surrender should find its place in our proposed list of specific statutory powers. We find support for this view in the fact that such a power is contained in the trustee legislation of other jurisdictions.[340] Accordingly, we recommend that the revised Act should provide that trustees may surrender insurance policies, leases or other property subject to onerous obligations of such a nature that it would not be in the interests of the beneficiaries to retain the trust property.[341]

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[334] Draft Bill, s. 35(*h*).

[335] *Trustee Act 1956*, *supra*, note 227, ss. 12 and 13.

[336] *Trustees Act, 1962*, *supra*, note 95, ss. 25(3), (4) and 26.

[337] *Trusts Act 1973*, *supra*, note 229, ss. 30(3), (4) and 33(1)(c).

[338] American Uniform Act, *supra*, note 233, § 3(c)(13), (14) and (15).

[339] Draft Bill, s. 35(*i*).

(x) Acquisition of Dwelling Home

At present, the Ontario *Trustee Act* does not permit trustees to rent, purchase, or build a house for the use of a beneficiary, and we are also informed that this power is not commonly found in trust instruments. The trustee legislation of New Zealand,[342] Queensland,[343] and Western Australia[344] permits trustees to purchase a dwelling house for the use of a beneficiary, and the New Zealand Act further allows trustees to erect a dwelling house or to lease accommodation for this purpose.

It may be contended that, in light of the power of investment that we have earlier recommended, it is unnecessary to include in our proposed list of statutory powers the power to acquire a dwelling house for a beneficiary. However, English case law has held that a power to invest in land does not authorize the purchase of land for use as a beneficiary's home, as the land would not produce income.[345] While this may be a correct interpretation of the investment power, we consider that circumstances may arise where trustees may reasonably desire to acquire property as a dwelling for a beneficiary. Indeed, the English Law Reform Committee has recently recommended that the case law position should be reversed and that a new statutory power should be introduced enabling trustees to purchase a residence for occupation by the person entitled to the income used for the purchase.[346]

We would confer upon trustees considerable latitude in this regard, and, as in the case of the New Zealand provision, we would authorize trustees not only to purchase land, but also to rent or erect accommodation for this purpose. However, we consider that before so acting trustees should obtain the consent of the income beneficiary. Accordingly, we recommend that the revised Act should provide that trustees may purchase or rent living accommodation, or construct a house on land held by them, for the purpose of providing a home for the person entitled to the income of the money expended in respect of the purchase, or to the income to be expended in respect of the rent, or to the income of either the land or the money expended in respect of the purchase or construction, if the person for whom the living accommodation is provided consents thereto.[347]

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[340] See, for example, the Western Australia *Trustees Act, 1962*, *supra*, note 95, ss. 30(1)(i) and (j), and 35; the New Zealand *Trustee Act 1956*, *supra*, note 227, ss. 15(1)(i) and (j) and 20(f); the Queensland *Trusts Act 1973*, *supra*, note 229, ss. 33(1)(k) and 38; and the American Uniform Act, *supra*, note 233, § 3(c)(7).

[341] Draft Bill, s. 35(*j*).

[342] *Trustee Act 1956*, *supra*, note 227, s. 14(2)(b), (2A), and (2B).

[343] *Trusts Act 1973*, *supra*, note 229, s. 22.

[344] *Trustees Act, 1962*, *supra*, note 95, s. 17.

[345] *In re Power*, [1947] 1 Ch. 572. In that case it was held that the investment power could not be used to purchase a home for the testator's widow and children, on the basis that, as the house did not produce income, it was not an investment. This reasoning is surprising since the rental of the property would otherwise have been payable to the widow as life tenant.

[346] English Law Reform Committee Report, *supra*, note 80, at 63.

(xi) Power to Borrow Money

There is no provision, at present, in the Ontario *Trustee Act* that authorizes trustees, in a general manner, to borrow money in relation to the management and operation of the trust. Section 44 of the Act does provide a limited power in this regard, and deals with the position where a testator devises to his executors or trustees land that he charges with the payment of his debts or with the payment of a legacy, without any express provision for the raising of such money to pay debts or a legacy. In such a case, the section empowers the executors or trustees to raise money to pay such debts or legacy by sale or by mortgage of the land.

Unlike the position under the Ontario *Trustee Act*, the legislation of New Zealand,[348] Western Australia,[349] and Queensland,[350] and the American Uniform Act[351] do contain a borrowing provision of general scope. We appreciate that it may be argued that trustees' borrowing powers should be limited by specifying the purpose for which borrowing is permissible, since it is a power that should not be exercised lightly by trustees. However, it seems to the Commission that, as there are numerous purposes for which trustees should be entitled to borrow funds, any attempt to list them all might well result in the omission of one or more. We are of the view that the revised Act should contain a borrowing power, and that the power should be in general terms, with the trustee's duty of care acting as a discipline in the employment of the power. Accordingly, we recommend that the revised Act should provide that trustees may borrow money and, as security, may mortgage, pledge, or otherwise charge any of the trust property.[352]

(xii) Settlement and Contestation of Claims

Section 48 of the Ontario *Trustee Act*, a provision that deals with the administration of estates, empowers a personal representative to pay debts and to compromise, compound, abandon, submit to arbitration or otherwise settle any debt. We are of the view that this is a useful provision and that it should be available to trustees. However, we would expand the provision in a manner similar to the American Uniform Act[353] and permit trustees to contest any claim, as well as to settle any claim. Accordingly, we recommend that the revised Act should provide that trustees may pay or assert or contest any claim, and compromise, compound, abandon, submit to arbitration or otherwise settle any debt, account, claim or thing relating to the trust or the trust property.[354]

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[347] Draft Bill, s. 35(*k*).

[348] *Trustee Act 1956*, *supra*, note 227, s. 21.

[349] *Trustees Act, 1962*, *supra*, note 95, s. 43.

[350] *Trusts Act 1973*, *supra*, note 229, s. 45.

[351] American Uniform Act, *supra*, note 233, § 3(c)(18).

[352] Draft Bill, s. 35(*l*).

[353] American Uniform Act, *supra*, note 233, § 3(c)(19).

(xiii) Power to Give a Receipt

The Ontario *Trustee Act* provides in section 24 that trustees may give receipts for the payment of money, thereby effectually discharging the person paying the money. The section provides as follows:

> 24. The payment of any money to and the receipt thereof by any person to whom the same is payable upon any trust, or for any limited purpose, and such payment to and receipt by the survivor or survivors of two or more mortgagees or holders or the executors or administrators of such survivor or their or his assigns, effectually discharges the person paying the same from seeing to the application or being answerable for the misapplication thereof.

We are of the view that this provision should be carried over to the revised Act, but we prefer a less complex formulation. Accordingly, we recommend that the revised Act should provide that trustees may give a receipt in writing for any money or other property received.[355] We further recommend that a receipt in writing for any money or other property received by trustees should be a sufficient discharge to the person paying or transferring the money or other property and should exonerate him from seeing to its application or being answerable for its misapplication.[356]

(xiv) Power to Pay Outgoings

Although we have earlier recommended that trustees should be able to pay any debt outstanding against the trust,[357] it is doubtful whether such a provision would comprehend the payment of taxes, premiums, assessments and other outgoings in relation to the trust property. We are of the view that, like the legislation of New Zealand,[358] Western Australia,[359] and Queensland,[360] and the American Uniform Act,[361] the revised Act should expressly provide this power for trustees. Accordingly, we recommend that the revised Act should contain a provision to the effect that trustees may pay out of trust money any taxes, assessments, charges, premiums or other outgoings in respect of trust property.[362] The secondary issue of which beneficial interest should bear the burden of these expenses is discussed in greater detail in a later part of this chapter.[363]

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[354] Draft Bill, s. 35(*m*).

[355] *Ibid.*, s. 35(*n*).

[356] *Ibid.*, s. 38.

[357] *Supra*, this ch., sec. 3(d)(xii).

[358] *Trustee Act 1956*, *supra*, note 227, s. 15(1)(f).

[359] *Trustees Act, 1962*, *supra*, note 95, s. 30(1)(g).

[360] *Trusts Act 1973*, *supra*, note 229, s. 33(1)(d).

[361] American Uniform Act, *supra*, note 233, § 3(c)(20).

(xv) Reimbursement of Expenses

Section 33 of the Ontario *Trustee Act* provides, in part,[364] that a trustee "may reimburse himself or pay or discharge out of the trust property all expenses incurred in or about the execution of his trust or powers". The power of reimbursement is, of course, a necessary administrative power that should be included in our proposed statutory list. Generally speaking, trustees in Ontario reimburse themselves for expenses before passing their accounts.[365] As a result, if any expense is later held to be improper, and if the trustees are unable to reimburse the trust, the trust will suffer a loss. However, if trustees could not reimburse themselves at the time the expense is incurred, they would have to have access to considerable sums of working capital in order to pay the current expenses of the trust, a requirement that, in our opinion, would be impracticable and, indeed, would impose a financial burden upon some private trustees. We do not consider that such an approach is desirable, and support the continuation of the present Ontario practice. Accordingly, we recommend that the revised Act should contain a provision to the effect that trustees may reimburse themselves or pay or discharge out of trust property all expenses incurred in or about the administration of the trust.[366] The issue of which beneficial interest should bear the cost of these reimbursements is canvassed at a subsequent point in this chapter.[367]

(xvi) Appropriation and Valuation of Property in Specie

As the law now stands in Ontario, trustees may only distribute property *in specie* to beneficiaries if the trust instrument so permits, or if all the beneficiaries are capacitated and agree to the appropriation and valuation.[368] The trustee legislation of New Zealand,[369] Western Australia,[370] and Queensland[371] confers upon trustees a power to value and appropriate property *in specie* in or towards satisfaction of the interest of a beneficiary. We consider that a provision of this kind is desirable for the efficient administration of a trust and should be incorporated in the proposed list of statutory powers.

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[362] Draft Bill, s. 35(*o*).

[363] See *infra*, this ch., sec. 4(b).

[364] The remainder of section 33 excludes liability for certain acts or omissions unless they occur through "wilful default", a subject that will be discussed in greater detail in ch. 6 of this Report.

[365] The reimbursement of actual expenses incurred by the trustees must be distinguished from the payment to trustees of general compensation. For a discussion of the latter topic, see *infra*, this ch., sec. 3(f).

[366] Draft Bill, s. 35(*p*).

[367] See *infra*, this ch., sec. 4(b).

[368] See Waters, *supra*, note 8, at 694-700.

[369] *Trustee Act 1956*, *supra*, note 227, s. 15(1)(j).

[370] *Trustees Act, 1962*, *supra*, note 95, s. 30(1)(k).

[371] *Trusts Act 1973*, *supra*, note 229, s. 33(1)(l) and (m).

Unlike the position under the present law, we do not consider it necessary for all beneficiaries to consent to an appropriation of trust property *in specie*. We are, nonetheless, of the view that trustees should be able to exercise the power only if the beneficiary in question consents to take the property *in specie*. If such consent is not forthcoming, there should be no appropriation of trust property to satisfy that beneficiary's share. If the beneficiary does consent to take the property, we agree with the Commonwealth legislation to which we have referred, which enables a beneficiary to apply to the court to vary the appropriation or valuation. The Commission is of the view that these qualifications provide a useful safeguard and strike a balance between possibly competing interests.

Accordingly, we recommend that the revised Act should provide that trustees may appropriate property *in specie* in or towards satisfaction of the share or interest of any beneficiary, with the consent of that beneficiary. For the purpose of the appropriation, following consultation with a qualified person where the trustees are not personally qualified, trustees should place a valuation on the property. However, no specific gift made by the trust instrument should be adversely affected by an appropriation of property *in specie*. In addition, within one month of the valuation, or such longer time as the court authorizes, the trustees, beneficiaries or any other interested person should be able to apply to the court for a review of the appropriation or the valuation, and, following such notice as the court may order, the court should confirm or make such variation as it considers proper.[372]

(xvii) Execution of Administrative Powers

Although the Ontario *Trustee Act* is silent on the point, it would appear that trustees are entitled to execute all acts or instruments that are necessary to implement any of their powers. We consider that it would be desirable to include expressly such a provision in our list of statutory powers, and we note that this approach has been followed in New Zealand,[373] Western Australia,[374] and Queensland,[375] and in the American Uniform Act.[376] Accordingly, we recommend that the revised Act should provide that trustees may do all supplementary or ancillary acts or things and execute all instruments necessary or desirable to enable them to carry out effectively the intent and purpose of the powers vested in them.[377]

We would emphasize, however, that such a power is not designed to permit trustees to exercise additional substantive administrative powers that are not contained in their trust instrument or in the revised Act. Rather, only procedural or administrative acts ancillary to the exercise of powers otherwise conferred should be performed under this proposed provision. If trustees wish to enlarge their administrative powers beyond those expressly provided by statute or the trust instrument, the assistance of the court should be sought, a topic that we turn to consider next.

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[372] Draft Bill, s. 35(*q*).

[373] *Trustee Act 1956*, *supra*, note 227, s. 15(1)(l).

[374] *Trustees Act, 1962*, *supra*, note 95, s. 30(1)(m).

[375] *Trusts Act 1973*, *supra*, note 229, s. 33(1)(n).

[376] American Uniform Act, *supra*, note 233, § 3(c)(26).

[377] Draft Bill, s. 35(*r*).

(e) ENLARGEMENT OF ADMINISTRATIVE POWERS

The scheme that we have so far proposed envisages that the revised Act will contain a list of specific administrative powers, which the creator of the trust will be free to exclude, modify, or add to as he wishes. However, we do recognize that situations may arise where the interests of the trust would be served if trustees could exercise a power not authorized by the trust instrument or contained in our proposed statutory list. In such circumstance, we are of the view that there should be a mechanism available to permit an enlargement of trustee powers.

In selecting this mechanism the Commission has examined two possible approaches. The first is that contained in section 3(a) of the American Uniform Trustees' Powers Act,[378] which provides as follows:

> 3. (a) From time of creation of the trust until final distribution of the assets of the trust, a trustee has the power to perform, without court authorization, every act which a prudent man would perform for the purposes of the trust including but not limited to the powers specified in subsection (c).

The Uniform Act not only enables trustees to exercise specifically enumerated administrative powers, but also empowers trustees to perform any other act that a prudent man would perform for the proper administration of the trust. In this fashion, trustees who wish to act in a particular manner need not be concerned whether, at the crucial moment, they possess the necessary power. We appreciate that the purpose of this provision in the Uniform Act is to encourage efficient and resourceful trusteeship. However, we have concluded that the revised Act should not adopt this approach.

In arriving at this conclusion, we have derived support from the fact that the trustee legislation of the Commonwealth, including the recent Acts of New Zealand, Western Australia, and Queensland, place in statutory form only specific administrative powers. The apprehension seems to be that a general authorization to trustees to carry out any act that a prudent man would perform might well encourage trustees to exercise powers that the creator of the trust did not desire should be exercised by his trustees. We are persuaded that it should remain primarily the domain of the testator or settlor to confer expressly upon trustees the powers that he wishes to be exercised in relation to the trust.

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[378] American Uniform Act, *supra*, note 233.

In the selection of an appropriate mechanism for the enlargement of administrative powers, the second approach that the Commission has examined is the judicial power that is contained in section 57 of the English *Trustee Act, 1925*.[379] This section states, in part,[380] as follows:

> 57.—(1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit . . .
>
> (2) The court may, from time to time, rescind or vary any order made under this section, or may make any new or further order.
>
> (3) An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.
>
> (4) This section does not apply to trustees of a settlement for the purposes of the Settled Land Act, 1925.

Unlike the position under the inherent jurisdiction of the court, this authority is not limited to emergency situations, where it must be demonstrated that the lack of a particular power will place the trust in danger of severe prejudice. Rather, this provision, which finds its place in the trustee legislation of Alberta,[381] Manitoba,[382] New Brunswick,[383] Nova Scotia,[384] and the Ordinances of the two territories,[385] enables the court to enlarge a trustee's administrative powers where, in the management of the trust, the transaction in question is "in the opinion of the court" expedient.

We are of the opinion that a power modelled upon section 57 of the English *Trustee Act, 1925* should be included in the revised Act. Such a power would complement our proposed statutory list of powers, and would also provide a necessary measure of control over the granting of powers to trustees that are beyond those usually contained in trust instruments. Further, should such a provision be included, trustees would no longer be required to seek an enlargement of their powers under the *Variation of Trusts Act*,[386] a use for which that Act was not primarily designed. Accordingly, we recommend that, where in the administration of trust property any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction is in the opinion of the court expedient, but it cannot be effected because of the absence of a power for that purpose vested in the trustees by the trust instrument or by law, the court should be able by order to confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose on such terms and subject to such provisions and conditions as the court thinks fit.[387] We further recommend that the court should be able to rescind, vary, or replace any such order, but that such a rescission, variation, or replacement should not affect any act or thing done in reliance upon the order before the person doing the act or thing became aware of the application to the court to rescind, vary, or replace the order.[388]

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[379] *Supra*, note 31, s. 57.

[380] It should be noted that section 57 also empowers the court to "direct in what manner any money authorized to be expended, and the costs of any transaction, are to be paid or borne as between capital and income", an aspect that will be discussed in greater detail *infra*, this ch., sec. 4(b).

[381] *Trustee Act*, *supra*, note 225, s. 21.

[382] *The Trustee Act*, *supra*, note 175, s. 60.

[383] *Trustees Act*, *supra*, note 58, s. 25.

[384] *Trustee Act*, *supra*, note 225, s. 50.

[385] *Trustee Ordinance* (N.W.T.), *supra*, note 59, s. 20, and *Trustee Ordinance* (Yukon), *supra*, note 60, s. 23.

(f) PASSING OF ACCOUNTS AND COMPENSATION OF TRUSTEES

In the previous sections of this chapter, we have discussed the various powers that trustees should possess in order to carry out effectively the administration of the trust. The time and care that a trustee expends on trust affairs may be considerable, and trustees usually anticipate that they will be compensated for their efforts. In return, the trust, in the form of the beneficiaries, expect that the trustees will give a full account of their activities concerning the administration of the trust. We shall turn to examine first the passing of the accounts of the trust by the trustees and, secondly, the general compensation of trustees.

(i) Passing of Accounts

Trustees have a duty to keep ongoing records concerning their activities with respect to the trust property,[389] and may from time to time, either voluntarily or as required by law, render a "true and just account" of the trust administration to the court.[390] This latter process is called "passing the accounts" of the trust. The trust instrument may contain an express provision that relates to the frequency and manner of passing of accounts. In the absence of such a direction, section 23(1) of the Ontario *Trustee Act* sets forth the procedure for trustees who wish to file their accounts with the court, and provides as follows:

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[386] *Supra*, note 217.

[387] Draft Bill, s. 63(1).

[388] *Ibid.*, s. 63(2).

[389] See *Sanford v. Porter* (1889), 16 O.A.R. 565, at 571, where, in this leading Canadian case, MacLennan J.A. stated that "[t]he duty of a trustee . . . is to have his accounts always ready, to afford all reasonable facilities for inspection and examination, and to give full information whenever required".

[390] See, generally, Waters, *supra*, note 8, at 729-34, and Baker (ed.), *Widdifield on Executors' Accounts* (5th ed., 1967), ch. 14.

> 23.—(1) A trustee desiring to pass the accounts of his dealings with the trust estate may file his accounts in the office of the surrogate court of a county or district in which he or a co-trustee is resident or in which any part of the trust estate is situate, and the proceedings and practice upon the passing of such accounts shall be the same and have the like effect as the passing of executors' or administrators' accounts in the surrogate court; but in the case of trustees under a will the accounts shall be filed and passed in the office of the surrogate court by which probate of the will was granted.

Pursuant to section 23(1), the procedure applicable to trustees for the passing of the accounts of a trust is the same as that for the passing of executors' or administrators' accounts in the surrogate court.[391] The procedure for the passing of executors' and administrators' accounts is prescribed by the *Surrogate Courts Act* [392] and Rules.[393] Briefly stated, the Rules provide that the accounts shall "contain a true and perfect inventory of the whole property",[394] and shall include the following: (a) an account showing of what the original estate consisted; (b) an account of all money received; (c) an account of all money disbursed; (d) an account of all property remaining on hand; (e) a statement of compensation claimed by the executor or administrator; and (f) such other accounts as the judge requires.[395]

It is not our intention to review here the present practice, or to make recommendations for reform, concerning the passing of accounts generally. This topic is being considered in detail in our Project dealing with the Administration of Estates of Deceased Persons,[396] and we anticipate that reform proposals made with respect to the passing of accounts for executors and administrators will apply equally, as under the present law, to ordinary trustees. Accordingly, pending a review of this area of the law at a later date by the Commission, we recommend that section 23(1) of the present *Trustee Act* should be carried over to the revised *Trustee Act*. The revised Act should provide that trustees desiring to pass the accounts of their dealings with the trust property may file their accounts in the office of any court having jurisdiction, and that the proceedings and practice upon the passing of such accounts shall be the same and have the like effect as the passing of the accounts of executors or administrators, except that, in the case of trustees under a will, the accounts shall be filed and passed in the office of the court by which probate of the will was granted.[397]

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[391] For an explanation of the procedure involved in the passing of accounts by executors and administrators, see Hull and Cullity, *Macdonell, Sheard and Hull on Probate Practice* (3d ed., 1981), ch. 23, and *Widdifield on Executors' Accounts*, *supra*, note 390, ch. 14.

[392] *Surrogate Courts Act*, R.S.O. 1980, c. 491, ss. 64, 73, 74, and 75.

[393] *Surrogate Court Rules*, R.R.O. 1980, Reg. 925, rr. 59-63.

[394] *Ibid.*, r. 61(1).

[395] *Ibid.*

[396] The objective of the Commission's current Project on the Administration of Estates of Deceased Persons is a new *Administration of Estates Act*. The new Act would bring together in revised form relevant portions of the *Trustee Act*, the *Estates Administration Act*, R.S.O. 1980, c. 143, the *Surrogate Courts Act*, *supra*, note 392, and Rules, *supra*, note 393, as well as a number of the common law doctrines that now govern estate administration.

[397] Draft Bill, s. 36(2).

There is one matter, however, that we wish to address at this juncture, which concerns the passing of accounts by a trustee of an *inter vivos* trust. At present, trustees of a testamentary trust may pass their accounts voluntarily or, by rule 59 of the Surrogate Court Rules, they "may be called upon by citation to do so on the application of any person interested therein".[398] Trustees of an *inter vivos* trust, however, cannot be compelled under the present law to pass their accounts, unless, of course, the trust instrument so provides; they need only do so voluntarily pursuant to the power to pass accounts conferred by section 23(1) of the *Trustee Act*.

We are concerned about the trustee of an *inter vivos* trust who declines to exercise his statutory (or express) power to pass his accounts. At present, a beneficiary who wishes to have an accounting of the trustee's activities must allege breach of trust by the trustee in connection with the trust's accounts in order to have the accounts brought before the court.[399] The beneficiary who is confronted by a recalcitrant trustee will usually wish to have the trustee demonstrate to the court that all is in order with respect to the trust, either because he suspects a breach of trust but has insufficient or no evidence upon which to base an action for breach, or because a limited interest, or indeed the trust itself, is about to terminate and the capital is about to be distributed.

We are of the view that a beneficiary should not have to commence an action for breach of trust in order to compel an accounting, especially in the circumstances where an interest or the trust itself is about to terminate. Like trustees of a testamentary trust, trustees of an *inter vivos* trust should be required to pass their accounts if required to do so; we can see no reason to distinguish the practice for testamentary trusts from that of *inter vivos* trusts in this regard. We would note that both Manitoba[400] and British Columbia[401] provide that trustees of testamentary and *inter vivos* trusts may be compelled to pass their accounts.

Accordingly, we recommend that Rule 59 of the Surrogate Court Rules should be amended and incorporated in the revised *Trustee Act* to provide that trustees, whether of an *inter vivos* or testamentary trust, may pass their accounts voluntarily or may be called upon by citation to do so on the application of any person interested therein.[402]

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[398] *Supra*, note 393, r. 59.

[399] Rule 607 of the Supreme Court of Ontario Rules of Practice, R.R.O. 1980, Reg. 540, provides that a *cestui que trust* may apply by originating notice for the determination without an administration of the trust of a number of enumerated questions or matters, including "[t]he furnishing of any particular accounts by the executors or administrators or trustees and the vouching (where necessary) of such accounts". However, *Re Smith*, [1952] O.W.N. 170 (H.C.J.), has held that this rule does not enable the court to make an order directing the trustee to make available to the beneficiary the accounts or other documents of the trust. Moreover, rule 607 does not address directly the situation where the beneficiary seeks to compel an accounting generally by the trustees, in the form of passing the accounts of the trust in court.

[400] Manitoba *Trustee Act*, *supra*, note 175, s. 87(2).

[401] British Columbia *Trustee Act*, *supra*, note 223, s. 101(2).

[402] Draft Bill, s. 36(1).

(ii) Compensation of Trustees

In a previous section of this chapter, we discussed the power that trustees should possess to reimburse themselves out of the trust property for all expenses incurred in or about the administration of the trust.[403] The reimbursement of all actual expenses incurred by trustees during the course of administering the trust is distinct from the payment of general compensation to the trustees. General compensation is a sum that is paid to a trustee for his time, efforts, and care expended on the activities of the trust.[404] The issue that the Commission has considered is whether the present provisions permitting general compensation are adequate to meet the needs of the modern trustee in administering a trust.

As we discussed in chapter 2 of this Report, equity requires that a trustee must "do nothing to place his own interest above his duties or even put himself in a position where he would be tempted to do so".[405] Two manifestations of this rule are that a trustee must not profit from the trust and that a trustee must act gratuitously.[406] Accordingly, while a trustee is clearly entitled to out-of-pocket expenses, he is not entitled to compensation from the trust fund, although several exceptions to this latter general rule have been recognized.

The first exception is where the settlor or testator expressly provides for remuneration in the trust instrument. The court will give effect to the intention of the trust creator to provide remuneration for the trustees, but only as to the amount stipulated in the trust instrument.[407] The second situation in which trustees may be remunerated is where there is an agreement between all the beneficiaries that the trustees shall be paid.[408] In such a case, the court will scrutinize the agreement carefully and will not enforce anything that appears to be unconscionable. Thirdly, the court may award compensation pursuant to its inherent jurisdiction where a solicitor, as trustee, has performed functions apart from those of the ordinary trustee, and, more rarely, where the work of the trust has taken up a great deal of the trustee's time.[409] This, in brief, is the law, at present, in England and in the majority of states in Australia.[410]

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[403] See *supra*, this ch., sec. 3(d)(xv), and Draft Bill, s. 35(*p*).

[404] The court determines the amount of compensation based upon the size and complexity of the trust, the care, ability, and skill required, and the time occupied in the administration: see *Re Anderson* (1923), 55 O.R. 527 (H.C. Div.); *French v. Toronto General Trusts Co.* (1923), 53 O.L.R. 336, [1924] 1 D.L.R. 288 (H.C. Div.); and *Re Hughes* (1918), 43 O.L.R. 594 (H.C. Div.). See, also, Hull and Cullity, *supra*, note 391, at 590.

[405] See Waters, *supra*, note 8, at 804-05. See *supra*, ch. 2, sec. 4(a).

[406] See Waters, *supra*, note 8, at 805.

[407] See *Heron v. Moffatt* (1879), 7 P.R. 438 (Ont. H.C.J.); *Williams v. Roy* (1885), 9 O.R. 534 (H.C.J.); and *Re Cooke* (1975), 5 O.R. (2d) 388 (Surr. Ct.). In *Re Taylor*, [1967] 2 O.R. 557 (Surr. Ct.), the Court held that the only agreement that would be binding would be the one located in the instrument creating the trust. See, also, Waters, *supra*, note 8, at 623.

[408] See *French v. Toronto General Trusts Co.*, *supra*, note 404. See, also, *Dart v. Drury* (1915), 8 W.W.R. 173, 23 D.L.R. 399 (Man. C.A.). See, also, Waters, *supra*, note 8, at 806.

[409] See *Cradock v. Piper* (1850), 1 Mac. & G. 664, and *Lewin on Trusts*, *supra*, note 25, at 195-205.

The trustee legislation in common law Canada, however, has adopted a different approach to the compensation of trustees than has legislation in England and the majority of the Australian states.[411] Since 1858, Ontario legislation has expressly authorized the court to allow a fair and reasonable compensation to trustees for their care, pain and trouble in the administration of a trust.[412] Today, the statutory authority permitting the court to award general compensation to trustees is contained in section 61 of the *Trustee Act*, which provides as follows:

> 61.—(1) A trustee, guardian or personal representative is entitled to such fair and reasonable allowance for his care, pains and trouble, and his time expended in and about the estate, as may be allowed by a judge of the Supreme Court or by any master or referee to whom the matter may be referred.
>
> (2) The amount of such compensation may be settled although the estate is not before the court in an action.
>
> (3) The judge of a surrogate court, in passing the accounts of a trustee or of a personal representative or guardian, may from time to time allow to him a fair and reasonable allowance for his care, pains and trouble, and his time expended in or about the estate.
>
> (4) Where a barrister or solicitor is a trustee, guardian or personal representative, and has rendered necessary professional services to the estate, regard may be had in making the allowance to such circumstance, and the allowance shall be increased by such amount as may be considered fair and reasonable in respect of such services.
>
> (5) Nothing in this section applies where the allowance is fixed by the instrument creating the trust.

As is clear from section 61(5), if the settlor or testator wishes to make provision for the remuneration of his trustees in the trust instrument, he may do so, and this provision will govern.[413] Where, however, no such provision is made, the trustees may apply to the court under section 61(1) for a determination of a fair and reasonable allowance, or may, on a passing of the accounts of the trust, have the allowance set by the court under section 61(3). In this latter regard, section 23(2) of the *Trustee Act* is relevant, and provides as follows:

> 23.—(2) Where the compensation payable to a trustee has not been fixed by the instrument creating the trust or otherwise, the judge of the surrogate court

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[410] See Pettit, *supra*, note 65, at 317-21, and Meagher and Gummow, *supra*, note 93, at 335-37.

[411] See, generally, Waters, *supra*, note 8, at 805-08.

[412] *The Surrogate Courts Act, 1858*, 22 Vict., c. 93, s. 47.

[413] Waters, *supra*, note 8, at 624, states that "when the trust or will itself provides for remuneration, the trustee has no access to the courts for more. The statute expressly withholds the statutory jurisdiction from the courts in those circumstances". See, also, *Re Edy* (1983), 13 E.T.R. 44 (B.C.).

> upon the passing of the accounts of the trustee has power to fix the amount of compensation payable to the trustee and the trustee is thereupon entitled to retain out of any moneys in his hands the amount so determined.

The seeming duplication of provision contained in sections 23(2) and 61(3) of the *Trustee Act* may be explained by the fact that these sections were introduced in the Act at different times.[414] In any event, in the majority of cases, especially in relation to testamentary trusts, trustees apply for compensation, and the court fixes the relevant amount, on a passing of the accounts of the trust, at which time all of the information relevant to the activities of the trustees for the period during which compensation is claimed is before the court.[415] Nonetheless, if trustees wish to apply to the court for compensation other than on a passing of accounts, and tender the necessary information to enable the court to fix the compensation, they may do so pursuant to section 61(1).[416]

We agree with the present procedures, as reflected in section 61(1) and (3) and section 23(2) of the *Trustee Act*, by which trustees, in the absence of a provision dealing with compensation in the trust instrument, may apply to the court for an award of a fair and reasonable compensation. We would, however, consolidate these three provisions of the present Act in the revised *Trustee Act*. Accordingly, we recommend that the revised Act should provide that trustees are entitled to such fair and reasonable compensation for their work and time spent on the trust as a court of competent jurisdiction on application or on the passing of accounts may award.[417] This provision would be subject to the expression of a contrary intention concerning compensation contained in the trust instrument.[418]

Section 61 of the *Trustee Act* also deals with the trustee who is a barrister or solicitor and who renders professional services to the trust apart from his duties as a trustee. Subsection (4) provides that a solicitor-trustee's general allowance may be increased to reflect professional services rendered to the trust. We agree with the principle contained in section 61(4), but are of the view that it should be extended to all trustees who render professional or special services to the trust apart from their functions as a trustee; they should be compensated according to the additional services rendered. Therefore, we recommend that section 61(4) of the present Act should be retained, but expanded in the revised Act to provide that trustees who possess or who because of their profession, business or calling have professional skills and who have rendered necessary professional services to the trust, apart from their duties and powers as trustees, are entitled to such additional compensation for such services as a court of competent jurisdiction may award.[419]

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[414] Section 61(3) of the Ontario *Trustee Act* was first enacted in *The Surrogate Courts Act, 1858*, *supra*, note 412. Section 23(2) of the *Trustee Act* was first introduced as s. 2 of *The Trustee Act, 1925*, S.O. 1925, c. 38. These sections first appeared together in *The Trustee Act, 1926*, S.O. 1926, c. 40, ss. 24 and 61(3).

[415] See *Widdifield on Executors' Accounts*, *supra*, note 390, ch. 14, and Hull and Cullity, *supra*, note 391, ch. 23.

[416] See Waters, *supra*, note 8, at 806-07.

[417] Draft Bill, s. 71(1).

[418] *Ibid*., s. 2(*b*).

[419] *Ibid*., s. 71(2).

Having reviewed the present statutory provisions governing compensation for trustees, and having recommended that these provisions should be carried over, in an amended form, to the revised Act, we also considered whether the revised Act should do more in the area of trustee compensation. As with the passing of accounts, the area of compensation is being reviewed in detail in our Project on Administration of Estates of Deceased Persons. We expect that recommendations made in that Project with respect to the compensation of executors and administrators will be equally applicable to the ordinary trustee. Accordingly, at the present time, we have chosen not to propose extensive general reforms in the area of trustee compensation, pending completion of the Project on Administration of Estates of Deceased Persons. We are of the opinion, however, that there is one aspect of this area of the law that should be addressed at this juncture, namely, the practice whereby trustees pay to themselves, from time to time and without court approval, sums from the trust fund as compensation, for which judicial approval is sought after the fact on a passing of acounts. This practice has been described as the "pre-taking" of compensation by trustees.

The pre-taking of compensation by trustees has been the subject of recent litigation. The central issue is whether statutory authority exists for trustees to take sums by way of compensation from the trust without the prior approval of the court and in the absence of an express provision in the trust instrument or an agreement between all the beneficiaries and the trustees authorizing such a method of taking compensation. *Widdifield on Executors' Accounts* contains the following statement, which predates the recent litigation, concerning the pre-taking of compensation by trustees:[420]

> It is a practice accepted in most jurisdictions for the executor to estimate and take some compensation as the receipts and disbursements occur rather than wait for a passing of accounts.

In support of this statement, two early Ontario cases, *Re Davis*[421] and *Heron v. Moffatt*,[422] are cited.

These two cases, however, have been criticized recently on the basis that they are not a strong and unambiguous authority for the pre-taking of compensation.[423] And, since 1979, courts in three cases – two in Western Canada, *Re Welbourn*[424] and *Re Prelutsky*,[425] and one in Ontario, *Re Knoch*[426] – have denied the authority of trustees to withdraw funds from the trust as compensation prior to court approval in the absence of an express authorization to this effect in the trust instrument. Each of the cases did, however, endorse the authority of trustees to reserve a portion of the trust assets in a separate fund to be used ultimately for the payment of court approved compensation.

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[420] *Widdifield on Executors' Accounts*, *supra*, note 390, at 339.

[421] [1936] O.W.N. 146 (H.C.J.).

[422] *Heron v. Moffatt*, *supra*, note 407.

[423] See, for example, Youdan, "Pre-taking of Remuneration by Trustee or Personal Representative" (1983), 13 E.T.R. 59, at 62-63.

[424] (1979), 96 D.L.R. (3d) 76, 4 E.T.R. 122 (Alta. Surr. Ct.).

[425] [1982] 4 W.W.R. 309, 11 E.T.R. 233 (B.C.S.C.).

[426] (1982), 12 E.T.R. 162 (Ont. Surr. Ct.).

Because of the unsettled state of the present position, the Commission has decided that the revised Act should deal with the question whether trustees should be able to take sums by way of compensation from the trust without the prior approval of the court where there is no express provision in the trust instrument or no agreement with the beneficiaries authorizing this method of compensation.

In favour of pre-taking, it is argued that, if trustees are not permitted to pre-take compensation, they may have to wait a substantial period of time before receiving judicially approved compensation on a passing of accounts. As we noted previously, the usual method by which trustees obtain compensation is pursuant to sections 23(2) or 61(3) of the *Trustee Act* on a passing of accounts.[427] On a passing of accounts, all relevant information concerning the trust administration is before the court, and on the basis of this information the court can determine a fair and reasonable compensation for the trustees. The accounts of a trust, however, are not usually passed on a regular or frequent basis, due largely to the extensive procedure involved and the cost to the trust that a passing of accounts entails. Generally speaking, accounts are rendered every two or three years in routine cases and every three to four years in the case of professional trustees.[428]

Accordingly, the notion of taking compensation prior to the passing of accounts becomes important if trustees are not to remain unpaid for long periods of time, which, in addition to personal inconvenience, may create serious cash flow problems for a trustee that may affect his ability to administer the trust. Proponents of pre-taking argue that it is fairer to the trustee to be paid as tasks are completed, rather than being required to wait for the passing of accounts of the trust. In addition, if trustees must wait until a passing of accounts to be remunerated, the compensation will be eroded by the effect of inflation. Inability to draw compensation at periodic intervals prior to court approval may also result in trustees being forced to pass the accounts of the trust – a costly procedure – on a more frequent basis than is necessary.

Opponents of the taking of compensation prior to judicial consent argue that, until the court awards a fair and reasonable amount to the trustees, they have no claim to trust funds. Accordingly, trustees should not be able to withdraw funds from the trust prematurely, and thereby deny the trust the benefit of these funds. While it is true that inflation will erode the true value of the trustee's remuneration, there is no reason, it is argued, why the amount of compensation ultimately allowed should not reflect this factor. It is also argued that the inability to pre-take compensation will not, in most cases, adversely affect the cash flow of trustees, especially professional trustees, given the fact that trustees can recover all out-of-pocket expenses as they are incurred. Lastly, and perhaps most important, are the concerns expressed about the trustee who takes an amount in excess of that to which he is entitled. When the propriety of the sum taken by the trustee is reviewed by the court and judged to be excessive, and if the trustee is insolvent or otherwise unable to repay the excess sum taken, a loss to the trust occurs. Given that, under the present law, the beneficiaries have a personal claim only against the trustee, it is likely that the full amount owed to the trust would not be recoverable.[429]

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[427] See *supra*, note 415 and accompanying text.

[428] See *Widdifield on Executors' Accounts*, *supra*, note 390, at 352.

We have considered these arguments carefully, and, on balance, have concluded that, in the absence of a contrary intent expressed in the trust instrument, trustees should be entitled to general compensation on a regular basis during the administration of the trust. In our view, trustees should not be forced to initiate costly accounting procedures before the court on a frequent basis for the sole purpose of obtaining compensation. Rather, they should be entitled to take sums periodically from the trust fund as compensation, without the approval of the court. We believe that the concerns expressed about the possible abuses that might result from such an authorization can be met by the imposition of appropriate controls upon the pre-taking of compensation and by the use of sanctions where the taking is judged by the court to be improper.[430]

We are strengthened in our view by the fact that, until the case of *Re Knoch*, the ability of trustees in Ontario to take interim compensation prior to a passing of accounts had not been in doubt and, we understand, occurred frequently without major difficulties. We therefore recommend that, in the absence of a contrary intent contained in the trust instrument[431] and subject to several specific controls that we shall propose, the revised *Trustee Act* should provide that trustees may, from time to time during the administration of the trust, pay to themselves or any of them from the assets of the trust such sum as in their opinion is fair and reasonable compensation for their work and time spent on the trust during the period of time to which the payment relates.[432]

In order to ensure that the interim compensation taken by the trustees is reasonable and proper, we are of the view that several requirements should be imposed upon the trustees. First, the trustees should be obliged to inform the beneficiaries, at the time they take the compensation, of the sum taken and should provide to them an account of the services rendered for such compensation. If the beneficiaries are of the view that the interim compensation is inappropriate, they may, under the present law governing trustees of a testamentary trust and under our proposals for trustees of a *inter vivos* trust, compel the trustees to pass the accounts of the trust.[433] Upon the passing of accounts, the court would be able to scrutinize the compensation taken by the trustees. Accordingly, we recommend that the revised Act should provide that, where trustees take interim compensation, they must, at the time of the taking, give notice to the beneficiaries of the sum taken and an account of the services rendered.[434]

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[429] See Youdan, *supra*, note 423, at 68.

[430] The Uniform Probate Code, Uniform Laws Ann., *Estates, Probate and Related Laws* (1972), Vol. 8, § 3-721, at 453, and the New York Civil Practice Act, N.Y. Civ. Prac. Law, § 8005 (McKinney), authorize trustees to pre-take compensation, and the trustees must give notice to the beneficiaries of the sum taken and the basis upon which it was taken. In the case of New York, the amount that trustees may pre-take is governed by a detailed tariff.

[431] Draft Bill, s. 2(*b*).

[432] *Ibid.*, s. 72(1).

Secondly, where the trustees have taken interim compensation, and they have not been compelled to pass the accounts of the trust, they should be required, on an application or when the accounts are eventually passed, to satisfy the court that the sum taken was fair and reasonable, and we so recommend.[435] While we do not favour prescribing by statute specific sums or percentages that may be taken by trustees as interim compensation, we are of the view that guidelines respecting the sums payable as compensation, as well as other matters respecting the taking of interim compensation, might be usefully provided by regulation. Accordingly, we recommend that the Lieutenant Governor in Council should be empowered to make such regulations.[436]

Finally, we wish to address the situation where a trustee has taken excessive interim compensation or otherwise wrongly appropriated funds from the trust as compensation. We recommend that, where the court determines that the interim compensation was not fair and reasonable, it should determine what is fair and reasonable, and should order the difference between the sum taken and the sum fixed by the court returned with interest to the trust.[437] In addition, we are of the view that, where the conduct of the trustee constitutes fraud, the court should be empowered to order the return to the trust of sums taken by the trustee in excess of a fair and reasonable compensation, and to deny compensation entirely. Accordingly, we recommend that the revised Act should provide that, where a court determines that the sum taken as interim compensation was fraudulently taken, the court shall order it to be returned to the trust, and may deny any compensation to the trustees.[438]

4. ALLOCATION OF RECEIPTS AND OUTGOINGS BETWEEN INCOME AND CAPITAL BENEFICIARIES

(a) Introduction

Unless required to retain a particular asset by directions, either express or implied, in the trust instrument, trustees have a duty to invest. The object of investment is to produce gain, which, although it can arise in many forms, may be viewed as falling into one or other of two categories. First, gain may constitute income or revenue return, such as rentals on residential or commercial buildings, interest on mortgages and bonds, or cash dividends on preference shares or common shares. Secondly, gain may take the form of capital growth or appreciation, as where the value of real estate or a business inventory increases, or where stock or stock options are issued in lieu of cash dividends.

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[433] See *supra*, note 402 and accompanying text.

[434] Draft Bill, s. 72(2)(*a*).

[435] *Ibid.*, s. 72(2)(*b*).

[436] *Ibid.*, s. 73.

[437] *Ibid.*, s. 72(3)(*b*).

[438] *Ibid.*, s. 72(3)(*a*).

The distinction between income and capital is not crucial where there is only one trust beneficiary; for instance, it will be a matter of indifference, tax implications aside, to a minor who will receive the property from trustees upon the attainment of majority whether gain accrues as income or capital, because he will take both. Similarly, if there is a class of beneficiaries, each of whom is to share in both income and capital when given circumstances occur, they will not be concerned with the form of the gain. Where the distinction is important, however, is where the trust is in favour of two or more persons with successive interests, one interest being to enjoy the trust property for a period of time, and the other to have the property absolutely at the conclusion of that period of time. Traditionally, a beneficiary with a limited interest in the trust property is described as being entitled to income, while a beneficiary with an interest in remainder is said to be entitled to capital. The income beneficiary would like to see the highest return of income that is compatible with non-hazardous investment, while the capital beneficiary wishes to ensure the maximum possible capital appreciation.

The problem that faces trustees is how to balance fairly the potentially conflicting interests of income and capital beneficiaries. In this regard, unless instructed otherwise by the trust instrument, trustees must buy and sell in the course of investment always having in mind these two interests. However, from an investment point of view, high income return may often be achieved at the expense of capital appreciation, and *vice versa*. Moreover, practically speaking, the receipt of gain does not always arise in the conceptually distinct forms of income and capital, and trustees may have to make difficult determinations concerning how a particular receipt should be treated.

So far, we have been concerned with the distribution of benefits that accrue either as income or as capital to the trust assets. However, the need to strike a balance between income and capital beneficiaries also arises in the context of expenses and losses. Most trust property, whether it is to be retained or converted for investment purposes, involves expenses, from repairing buildings to meeting calls on shares. So too, losses may be incurred in the administration of a trust. The question for trustees is whether the expenses or losses, which we shall refer to collectively as "outgoings", should be a charge on the income or the capital. Although trustees are primarily responsible to creditors, the interest of either the income or capital beneficiary must ultimately bear the burden.

The short answer to the problem of allocating both receipts and outgoings is that the trust instrument should specify the beneficiaries who are entitled to the several receipts and who are to bear the several outgoings. Provided that a testator or settlor creates interests or estates that are certain in quantum and permitted by law, he may allocate all receipts between successive beneficiaries as he wishes. Likewise, there are no restraints upon a creator of the trust in the distribution of outgoings; he may provide that they all shall be borne by the trust capital, be shared between income and capital, or be borne exclusively by income. However, when the settlor or testator does not expressly state his intention on these matters, it must be determined whether the instrument impliedly reveals his intention, an exercise that may result in difficult problems of construction. If the intention of the creator of the trust cannot be garnered from the trust instrument, the case law provides rules that reflect what the reasonable man creating competing interests must have contemplated. In other words, the law attempts to be fair and equitable as between the competing claims, assuming that this is what the creator of the trust would have desired. The case law is extensive in this area, and is fully examined in the available texts.[439]

Our purpose in this section of the chapter is to ask whether the revised Act could assist trustees, in the absence of express directions in the trust instrument, in allocating receipts and outgoings between income and capital beneficiaries. We first turn to consider the allocation of outgoings. Thereafter, we shall discuss the allocation of receipts between income and capital beneficiaries.

(b) ALLOCATION OF OUTGOINGS

(i) Ontario

Section 21(1) of the Ontario *Trustee Act*[440] authorizes trustees to insure property against loss or damage. This section provides, in part,[441] as follows:

> A trustee may . . . pay the premiums for such insurance out of the income thereof or out of the income of any other property subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to such income.

Aside from this provision, the Act is silent regarding the allocation of outgoings by trustees.[442] To determine which beneficial interest should bear the burden of a particular outgoing, trustees must rely either upon directions expressed or implied in the trust instrument, or upon the case law.

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[439] See, for example, Waters, *supra*, note 8, at 690-728; *Widdifield on Executors' Accounts*, *supra*, note 390, ch. 7; *Lewin on Trusts*, *supra*, note 25, at 228-49; Hayton (ed.), *Underhill's Law relating to Trusts and Trustees* (13th ed., 1979), chs. 11 and 12; and Meagher and Gummow, *supra*, note 93, at 376-90.

[440] *Supra*, note 6.

[441] For a discussion of the power to insure trust property, see *supra*, this ch., sec. 3(d)(vi).

[442] It should be noted, however, that section 49(1) of the Ontario *Trustee Act* abolishes the rule in *Allhusen v. Whittell* (1867), L.R. 4 Eq. 295. This section, found in the administration of estates part of the Act, provides that, unless a contrary intent appears in the will, the debts, funeral and testamentary expenses, estate, legacy, succession and inheritance taxes or duties, or other similar disbursements, are to be paid out of capital, unless the capital is insufficient. This provision, among others, will be examined by the Commission in the course of its current Project on the Administration of Estates of Deceased Persons.

In allocating the burden of outgoings between income and capital beneficiaries, the principle followed by the case law is that the nature of the burden will determine upon whom it falls; that is, outgoings of an income nature are borne by the income beneficiaries, while those of a capital nature are the responsibility of the capital beneficiaries.[443] For example, recurring annual expenses such as property taxes, insurance premiums, and ongoing repairs and maintenance are usually attributed to income,[444] while major improvements or expenditures, such as substantial repairs, are normally associated with capital. Similarly, the costs of the administration of the trust, including investment and solicitors' fees, as well as trustees' remuneration, have been regarded by the courts as sufficiently basic to the trust that they should be borne by capital. However, this is only a *prima facie* determination; if in any particular case costs are incurred that relate exclusively to the administration of the life tenant's interest, they will, in all probability, be assessed against income.[445]

Sometimes courts have been prepared to attribute an expense to both income and capital beneficiaries although, generally speaking, acts done for the benefit of the trust as a whole are treated as a burden on the capital. This result is based upon the premise that, if capital meets these costs, the life tenant, who loses the income that would have been produced by the capital expended, thereby indirectly shares the burden. In relation to losses occurring from the sale of an investment, such as a mortgage security, the law is less clear concerning how the loss should be borne: although the courts agree that the loss must be apportioned, there is disagreement concerning the method of apportionment.[446] However, if a business is carried on by trustees, one year's losses must be made good out of another year's profits. Should the business be sold, losses that occur pending the sale will be apportioned between income and capital.

(ii) Other Canadian Jurisdictions

For the most part, the trustee legislation of the common law jurisdictions of Canada does not contain general provisions relating to the allocation of outgoings. Rather, like Ontario, they contain one, or perhaps several, sections that deal with the allocation of outgoings in particular instances.

All the provincial Trustee Acts, except the Prince Edward Island Act, authorize trustees to insure the trust property and to pay the premiums out of income.[447] In addition, the Manitoba *Trustee Act*[448] contains a provision concerning audits, and confers upon trustees a discretion to determine whether the costs should be borne by capital or income. Both the Manitoba[449] and British Columbia[450] Acts permit trustees to borrow money by way of mortgage or charge upon all or any part of the trust property for the purpose of carrying out repairs and improvements – a power similar to that which we have previously recommended should be included in the revised Act[451] – but the Acts are silent regarding which trust interest should bear the burden of repayment. Presumably, case law would attribute the interest payments on such loans to income and capital repayments to capital.

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[443] See, generally, Waters, *supra*, note 8, at 712-28.

[444] See *Re Caulfield*, [1933] O.W.N. 233 (H.C.J.).

[445] See *Re Vair* (1923), 54 O.L.R. 497 (H.C.Div.).

[446] See *In re Plumb* (1896), 27 O.R. 601 (H.C.J.), foll'g *In re Foster* (1890), 45 Ch. D. 629, where it was determined that income and capital beneficiaries should share the loss in the proportion that each would have benefited had the loan been fully repaid with interest. However, in *In re Moore* (1885), 54 L. J. Ch. 432, it was thought that the division of the price received on the market should be on the basis of the relative amounts owed when foreclosure took place; that is, arrears of interest and capital.

As we noted earlier, the Trustee Acts of Alberta,[452] Manitoba,[453] New Brunswick,[454] Nova Scotia,[455] and the Ordinances of the Yukon[456] and Northwest Territories[457] empower the court to confer additional administrative powers upon trustees, and we have recommended that the revised Act should contain a similar power.[458] These Acts further enable the court to direct how the costs involved in the exercise of the powers granted are to be borne as between capital and income; that is, the court may direct the manner in which any money authorized to be expended, and the costs of any transaction authorized to be undertaken, are to be paid or borne as between capital and income.

In one respect, the Prince Edward Island *Trustee Act*[459] departs somewhat from the typical Canadian approach by providing for the allocation of losses through the establishment of a depreciation or obsolescence fund. Section 3(1) and (2) of the Act provides as follows:

> 3.—(1) Unless expressly forbidden by the instrument or order appointing him or creating the trust, a trustee, who has power to hold real estate as an investment or to invest the trust property under his control, or any part thereof, in real estate, may and if ordered by a court of competent jurisdiction shall, from time to time,

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[447] British Columbia *Trustee Act*, *supra*, note 223, s. 8; Alberta *Trustee Act*, *supra*, note 225, s. 24, Saskatchewan *Trustee Act*, R.S.S. 1978, c. T-23, s. 45; Manitoba *Trustee Act*, *supra*, note 175, s. 39; New Brunswick *Trustees Act*, *supra*, note 58, s. 5; Nova Scotia *Trustee Act*, *supra*, note 225, s. 23; Newfoundland *Trustee Act*, R.S.N. 1970, c. 380, s. 19; Yukon *Trustee Ordinance*, *supra*, note 60, s. 26; and Northwest Territories *Trustee Ordinance*, *supra*, note 59, s. 23.

[448] Manitoba *Trustee Act*, *supra*, note 175, s. 85.

[449] *Ibid.*, s. 32(4).

[450] British Columbia *Trustee Act*, *supra*, note 223, s. 11.

[451] See *supra*, this ch., sec. 3(d)(xi).

[452] Alberta *Trustee Act*, *supra*, note 225, s. 21.

[453] Manitoba *Trustee Act*, *supra*, note 175, s. 60.

[454] New Brunswick *Trustees Act*, *supra*, note 58, s. 25.

[455] Nova Scotia *Trustee Act*, *supra*, note 225, s. 50.

[456] Yukon *Trustee Ordinance*, *supra*, note 60, s. 23.

[457] Northwest Territories *Trustee Ordinance*, *supra*, note 59, s. 20.

[458] See *supra*, this ch., sec. 3(e).

[459] *Trustee Act*, R.S.P.E.I. 1974, c. T-9, s. 3.

> in respect of any such real estate, whether situated within or outside this province held or acquired by him as such trustee, deduct from and set aside out of the income whenever received from the real estate such fair and reasonable amounts as he may deem proper, having regard to recognized accounting practice and reasonable business prudence, to protect the capital of the trust from loss due to depreciation in value or obsolescence of any improvements upon or of any property used in connection with any such real estate, and any amounts so deducted and set aside shall be added to the capital of the trust.
>
> (2) Any exercise of discretion by the trustee pursuant to subsection (1) shall be final and conclusive as to all other persons interested in the trust.

Accordingly, unless expressly forbidden by the trust instrument, where trustees are authorized to hold or invest in real estate, they may make deductions from income received from the real estate to protect the capital of the trust from loss due to depreciation in value of, or obsolescence of any improvements upon, any property used in connection with the real estate. The word "improvements" is not defined in the Act, but would presumably include buildings and essential facilities. Moreover, a trustee may be "ordered by a court of competent jurisdiction" to act in this fashion.

The section provides that all deductions from income are to be set aside and added to capital, but the section is silent concerning the disposition of money deducted from income that, as events turn out, is not required to meet losses arising from depreciation or obsolescence. Probably, such money would not be recoverable by income beneficiaries,[460] although, if the income deductions are to be added to capital, the fund so established should be appropriately invested, and the income beneficiaries would be entitled to the interest on that investment. However, trustees may only make "fair and reasonable" deductions, and they are required to have regard to "recognized accounting practice and reasonable business prudence".

Finally, it will be noted that by section 3(2) of the Prince Edward Island Act, trustees' decisions are final and conclusive upon all the trust beneficiaries; in the result, therefore, the decisions of trustees who *prima facie* comply with the requirements of the section may only be challenged on the grounds of bad faith.

(iii) Other Commonwealth Jurisdictions

The trustee legislation of Western Australia,[461] Queensland,[462] and New Zealand[463] contains various provisions regarding the allocation of outgoings between income and capital beneficiaries. For present purposes, we consider it sufficient to do no more than mention that, as with the Canadian position, this legislation deals with the allocation of outgoings in particular instances. For example, the Queensland Act[464] authorizes trustees to attribute insurance premiums to either capital or income, or both, as they think equitable in the circumstances, subject to any direction to the contrary in the trust terms or of the court. The Queensland Act,[465] together with the Western Australia Act,[466] provides that the costs of audits may be charged to capital or income, or in an appropriate division to each, as the trustees shall in their discretion think fit. However, the trustee legislation of these Commonwealth jurisdictions contains two features that we consider merit more detailed comment.

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[460] In *Chartered Trust Co. v. Robertson Estate*, [1953] 2 S.C.R. 1, trustees, pursuant to their authority under a will to carry on a business, set up a reserve for depreciation with respect to certain assets, a plant and a building, in which the business was conducted. The Court held that the unused reserve was not an accumulation within the meaning of the Ontario *Accumulations Act* (now R.S.O. 1980, c. 5), as, if depreciation deductions from income were fair and reasonable when made, the reserve nevertheless became part of capital.

[461] *Trustees Act, 1962*, *supra*, note 95.

[462] *Trusts Act 1973*, *supra*, note 229.

[463] *Trustee Act 1956*, *supra*, note 227.

The first feature of this legislation that we wish to discuss is the depreciation or replacement fund authorized by the New Zealand[467] and Western Australia[468] trustee legislation. This fund is not, in principle, unlike the obsolescence fund contained in the Prince Edward Island *Trustee Act*. However, unlike the Prince Edward Island fund, which, it will be recalled, is only authorized where trustees hold or invest in real estate, the Western Australia and New Zealand fund may be set up in relation to "any property employed in the production of income or from which income is derived". Moreover, it is not obligatory for trustees to establish such a fund, but, if so established, the income deducted may be used as trustees think fit for repair, maintenance, or acquisition of property of a like or advantageous nature. Further, the fund, presumably including any excess income that is not required to meet actual depreciation or replacement costs, shall "follow the destination of the capital of the property".

The second feature of the legislation that we find of interest is the discretionary apportionment and recouping provision. This provision appears in the statutes of Western Australia,[469] New Zealand,[470] and Queensland,[471] although its scope is not the same in each Act. However, all three Acts provide, in part, as follows:

> . . . every trustee, in respect of any property, may . . . apportion [a payment or expenditure] between capital and income or otherwise among the persons entitled thereto in such manner as he considers equitable, with power, where the whole or part of the payment or expenditure is made out of capital moneys, to recoup capital from subsequent income, if that course would be equitable in all the circumstances.

Accordingly, trustees are vested with a discretion to determine whether a particular expenditure should be met by either income or capital, or apportioned according to the circumstances of the case. Moreover, the provision permits trustees to make immediate necessary expenditures out of capital, but to allocate a fair share of any such cost to income and recoup the capital from subsequent income.

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[464] *Trusts Act 1973*, *supra*, note 229, s. 47(3).

[465] *Ibid.*, s. 52(2).

[466] *Trustees Act, 1962*, *supra*, note 95, s. 51(2).

[467] *Trustee Act 1956*, *supra*, note 227, s. 15(2).

[468] *Trustees Act, 1962*, *supra*, note 95, s. 30(2).

[469] *Ibid.*, s. 30(1)(b).

[470] *Trustee Act 1956*, *supra*, note 227, s. 15(1)(a).

[471] *Trusts Act 1973*, *supra*, note 229, s. 33(1)(g).

The provisions in each of the above-noted Commonwealth Acts differ, however, in two respects. First, the New Zealand and Western Australia provisions limit the discretionary power of apportionment and recoupment to expenditures effected on repair, maintenance, upkeep or renovation of trust property, while the Queensland *Trusts Act 1973* extends the power to expenditures made in respect of improvement or development costs, calls on shares, property taxes, assessments and similar outgoings, subdivision payments, and costs associated with the construction and maintenance of roads, streets, and other rights of way, of sewage, water, electricity, drainage, and similar works.[472] Secondly, the application of the Queensland section is subject only to the Act and any direction of the court, but it is not subject to a contrary intention expressed in the trust instrument.[473] The New Zealand and Western Australia provisions, on the other hand, are subject not only to a contrary direction of the court and to a contrary intention contained in the trust instrument, but also to "the rules of law applicable in such cases". This latter exception appears to subordinate the trustee's discretion to discernible common law rules.

(iv) Conclusions

From our review of relevant statutory provisions in other jurisdictions, we find ourselves attracted to the principle contained in the provisions of the Queensland, Western Australia, and New Zealand Acts: namely, the conferring upon trustees of a power to determine, in their discretion, an equitable allocation of outgoings between income and capital beneficiaries. Our reasons for this view are several.

First, there appears to be uncertainty in the law concerning the allocation of outgoings between successive beneficiaries. As a result, trustees may, in the administration of their trust, be required to distribute the burden of outgoings in situations where the law provides little guidance. Perhaps, for this reason, it is the rule rather than the exception that extensive discretionary powers of allocation are conferred upon trustees by the trust instrument. However, even where discretionary powers are so conferred, the duty to hold an even hand among beneficiaries requires trustees to select a mode of apportionment that is reasonable and fair in the circumstances. Accordingly, it may be said that the New Zealand, Western Australia, and Queensland Acts more accurately reflect the practice in this area.

Secondly, where clear rules have been formulated, either by case law or by statutory provisions, they are often inflexible and, therefore, not appropriate for all situations. There may be a number of instances in the conduct of every trust where, although the case law would classify the expense or loss as an income or a capital responsibility, nevertheless, it would seem to be more equitable if it were apportioned between both classes of beneficiary. For example, major renovations will increase rentals, although expenditures of this kind are normally regarded as permanent and, therefore, as a capital investment. Also, it is not entirely clear why the premiums on property insurance should be solely the responsibility of the life tenant. If the property is destroyed and the insured value of the property is recovered from the insurer, the capital beneficiary will gain either through the investment by the trustees of the sum so acquired, or by its expenditure on reinstatement. Moreover, as the nature of outgoings is so diverse, the formulation of specific rules of allocation in the revised Act might well result in a situation where not all instances in which trustees might require guidance are addressed.

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[472] See Queensland Law Reform Commission, *A Report of the Law Reform Commission on the Law Relating to Trusts, Trustees, Settled Land and Charities* (1971), No. 8, at 34-35 (hereinafter referred to as "Queensland Report"), for an explanation of s. 33(1)(g).

[473] *Trusts Act 1973*, *supra*, note 229, s. 31.

Accordingly, the Commission is of the opinion that a discretionary power to allocate outgoings between income and capital as trustees see fit would better equip trustees to make determinations that would be appropriate in each individual case. Further, we would not limit this power of discretionary allocation to particular expenditures, as have the Acts of New Zealand and Western Australia, and as does, to a lesser extent, the Queensland statute. Rather, we have concluded that this policy is equally applicable to all types of expense and loss, and that a comprehensive discretionary power of allocation should be conferred upon trustees. In so concluding, we place reliance upon the trustee's duty of even-handedness to ensure the exercise of the discretion in a manner that is equitable between all those concerned, and upon the trustee's general duty of care, which we have recommended be placed in the revised Act to govern the exercise of all administrative powers by trustees.[474]

The Commission, therefore, recommends that the revised Act should contain a provision to the effect that trustees may apportion any payment or expenditure for any outgoing between the income and capital accounts, or may charge the payment or expenditure exclusively to either income or capital as they consider just and equitable in all the circumstances.[475] Regarding the scope of the term "outgoings", we recommend that the revised Act should define this term to mean payments and expenditures, whether discharged by the trustees or a beneficiary, resulting from and necessitated by the existence of the trust property, and that the term should include expenses of administration, repairs, maintenance, insurance, taxes, payments on account of mortgages and debts, calls on shares, annuities, and business and other losses.[476] If the above recommendations are accepted, the Commission further recommends that the portion of section 21 of the Ontario *Trustee Act* that deals with the payment of insurance premiums out of income should not be carried over to the revised Act.

Apart from the allocation of outgoings between the income and capital account, trustees are often confronted with difficult decisions concerning the actual payment of these burdens. At present, trustees would surely be in breach of trust if they initially met costs, chargeable to income, out of capital, or *vice versa*. Moreover, if payments were made out of capital, trustees would be personally liable if loss to the capital account took place because the money so expended was not later recoverable from the income beneficiary. However, situations may arise where it would be more advantageous for the trust to meet expenditures either wholly or partly out of a beneficial interest that might not ultimately bear the entire cost. For example, it might be financially more appropriate, having regard to sound business practice, for a certain expense to be met initially out of income, although it be an expense that would later require allocation either in whole or in part to capital. On the other hand, although a particularly heavy burden might ultimately be allocated to income, there might not be sufficient income to meet the burden, as well as the financial requirements of the income beneficiary, in a given year. In such a case, it might be desirable to pay the expenditure out of capital and to allocate an appropriate portion of the burden to income over a number of years.

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[474] See *supra*, ch. 2, sec. 2, and Draft Bill, s. 4.

[475] Draft Bill, s. 49(1).

[476] *Ibid.*, s. 1(*j*).

To meet these situations, we have concluded that trustees should be permitted to pay for any outgoing from either income or capital, in whole or in part, in a manner that they determine to be in the best interests of the trust beneficiaries. Moreover, for reasons that we have stated, this matter should be expressly addressed in the revised Act.[477] Accordingly, we recommend that the revised Act should contain a provision to the effect that trustees may pay for any outgoing from income or capital, or wholly or partly from each, as appears to them to be in accord with sound business practice and in the best interests of the trust beneficiaries as a whole.[478]

Further, to enable trustees, after payment has been rendered, to allocate the burden to those beneficial interests that should bear it, we have concluded that the revised Act should incorporate a provision akin to the recouping provision that is contained in the New Zealand, Western Australia, and Queensland trustee legislation. However, to complement the previous recommendation concerning payment of outgoings, we are of the view that the provision should be expanded to allow not only the recouping of capital from income, where the whole or part of the payment or expenditure has been made out of or charged to capital, but also the recouping of income from capital, where the whole or part of the payment has been made out of or charged to income, if, in either case, trustees consider that course to be just and equitable in all the circumstances, and we so recommend.[479]

We are also of the view that the establishment of a depreciation or obsolescence fund, similar to the fund authorized by the Prince Edward

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[477] The power to recoup capital from subsequent income contained in the Western Australia, Queensland, and New Zealand Acts presumes that an actual payment was made out of capital that should ultimately be borne by income.

[478] Draft Bill, s. 40(2).

[479] *Ibid.*

Island, Western Australia, and New Zealand Acts would be useful.[480] We have concluded that trustees should be empowered to deduct from the income of property that is subject to depreciation or obsolescence such amounts as they deem reasonable to protect the capital of the trust from loss, and that the amounts so deducted should be set aside and added to capital. The fund would be employed to finance such tasks as repair, maintenance, or renovation, and would be particularly appropriate in those instances where the income beneficiary is receiving the entire income of the trust, but is not maintaining the trust property; for example, a house that will eventually fall into the possession of the capital beneficiary.[481]

As in the case of the New Zealand and Western Australia provisions, we believe that the fund should be authorized for any property that produces income and is subject to depreciation or obsolescence. Also, we agree in principle with the Prince Edward Island provision that compels trustees to set up a fund if so ordered by a court. However, we would depart from the Prince Edward Island provision that renders all such decisions final and conclusive, as we prefer to leave the exercise of this discretion to the scrutiny of the present law. Accordingly, we recommend that the revised Act should provide that trustees may, and if ordered by the court upon application shall, deduct from the income derived from trust property that is subject to depreciation or obsolescence such amounts as are fair and reasonable having regard to sound business practice in order to protect the capital of the trust from loss, and that any sums so deducted should be set aside and added to the capital of the trust so as to become capital for all purposes.[482]

We would, however, make two exceptions to the above recommendations concerning the powers of trustees to pay and to allocate outgoings, to recoup payments made, and to establish a depreciation fund. First, in view of the terms of the *Income Tax Act* (Canada),[483] we are compelled to except spousal trusts from the above recommendations. Where there is a testamentary or *inter vivos* transfer of capital property to a spouse, the advantageous rollover provisions of the Act will only apply if the provisions of the trust satisfy certain requirements, including the following: the spouse must be entitled to receive the entire income of the trust that arises during his or her lifetime; and no other person may receive or otherwise obtain the use of the income or capital of the trust during that period. Our recommendations to allow income deductions for depreciation to be added to capital and to permit trustees to use, albeit on a temporary basis, income to pay for an expense that will be met ultimately by capital would "taint" the spousal trust, thereby disqualifying the assets from the preferential taxation treatment afforded by the federal Act. We consider that this interplay between the recommended provisions of the revised Act and the terms of the *Income Tax Act* (Canada) should be a matter for decision by the creator of the trust. Accordingly, we recommend that where a trust is a trust for the exclusive benefit of the spouse of the testator or settlor within the meaning of the *Income Tax Act* (Canada), the above recommendations should not apply to the trust unless the trust instrument expressly provides that the provisions contemplated or a specified part thereof should apply.[484]

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[480] We are aware that the Queensland Report, *supra*, note 472, at 76, did not recommend the adoption of a depreciation or replacement fund. The Commission was of the view that such a fund was inconsistent with subsequent provisions contained in both the Western Australia *Trustees Act, 1962*, *supra*, note 95, s. 105, and the New Zealand *Trustee Act 1956*, *supra*, note 227, s. 85. These sections provide that the whole of the net income of property settled as a residuary gift shall, pending sale, be applied as income, notwithstanding that the property may be of a wasting, speculative, or reversionary nature. This recommendation was accepted by the Queensland Parliament, and, accordingly, the *Trusts Act 1973*, *supra*, note 229, does not contain a provision authorizing a depreciation or obsolescence fund. It should be noted that, as we do not recommend the adoption of a provision similar to ss. 105 and 85 of the Western Australia and New Zealand Acts, respectively, we are of the view that the inconsistency mentioned by the Queensland Report will not arise in the revised Act: see *infra*, this ch., sec. 4(c)(ii).

[481] We have considered the provisions of the American Uniform Principal and Income Act, Uniform Laws Annotated (1978), Vol. 7A, at 429, §§ 9-11 (hereinafter referred to as "American Uniform Principal and Income Act"), which deal with the depletion of capital that occurs with the working of minerals and of timber lands, as well as with leaseholds, patents, copyrights and royalty rights. However, we observe that these sections have often been amended by states adopting the Act, and take note that clauses concerning depletion reserves are evidently best drawn without particular circumstances in mind.

[482] Draft Bill, s. 40(3).

[483] *Supra*, note 281, ss. 70(6), 70(7), 73, 74, and 104(4)(*a*).

Secondly, because these recommendations effect a significant change in relation to the allocation of outgoings, we recommend that they should only apply to trusts that take effect after the revised Act comes into force, and that the revised Act should state expressly that they are subject to the duty to maintain an even hand between income and capital beneficiaries.[485]

Finally, it will be recalled that we previously recommended that the court should be authorized to confer upon trustees additional powers of administration if, in the opinion of the court, it is thought necessary and expedient to do so.[486] We have referred to the fact that other jurisdictions that have enacted such a provision also confer upon the court the authority to determine how the cost of the exercise of the power should be borne.[487] We are of the view that a provision of this kind would be of assistance to trustees, and, accordingly, recommend that the revised Act should provide that, where the court confers upon trustees an additional administrative power, the court should be able to direct in what manner any money authorized to be expended and the costs of any transaction are to be paid or borne as between capital and income.[488]

(c) ALLOCATION OF RECEIPTS

An important function of trustees is to allocate gain received by the trust. As we discussed briefly in the introduction to this section, where a trust is in favour of two or more persons entitled in succession, potentially conflicting interests arise regarding the enjoyment of the trust property. Primarily, it is a matter of determining what the settlor or the testator intended in this regard, as he is free to distribute his property among his beneficiaries as he desires. However, if the intention of the creator of the trust has not been clearly expressed, or is not implicit in the language of the instrument and the nature of the disposition, the law infers what the reasonable man creating competing interests must have contemplated. Although in the distribution of particular receipts rules formulated by the case law are, for the most part, well settled,[489] the following areas of the law, in our opinion, merit further comment: first, where a change occurs in the ownership of, or the entitlement to, an authorized investment; secondly, where assets that are unauthorized as trustee investments, either by the instrument or by statute, fall into a trust and income must be allocated pending conversion of these assets; and thirdly, where proceeds from an insurance policy are received by trustees.

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[484] Draft Bill, s. 40(4).

[485] *Ibid.*, s. 40(5). See, also, Draft Bill, s. 39(1), and *infra*, this ch., sec. 4(c)(ii).

[486] See *supra*, this ch., sec. 3(e), and Draft Bill, s. 63.

[487] See *supra*, this ch., sec. 4(b)(ii).

[488] Draft Bill, s. 63(1).

(i) Competing Claims on Change of Ownership

Competing claims to the income of authorized trustee investments may arise when a change occurs in the ownership of, or entitlement to, assets during the time when interest, dividends, rent, or other periodic revenue is accruing, and where, therefore, the accrued sum does not fall due until after the change of ownership or entitlement has taken place. This situation may arise at several points during the life of a trust: first, at the inception of the trust, when the beneficial enjoyment of the assets passes from the creator of the trust to the life beneficiary; secondly, at the termination of the life estate, when the entitlement to the assets passes from a life beneficiary to a remainderman; and thirdly, when trustees buy or sell assets during the term of the beneficial life interest. If, at any of these transitional points, an asset has accrued or continues to accrue revenue, but the whole of the accrued amount does not fall due and is not payable until after the change of ownership or entitlement has occurred, trustees must determine, upon receipt of the payment, which beneficial interest is entitled to the amount that has so accrued.

a. Ontario

In Ontario, the *Apportionment Act*[490] assists trustees with the allocation of certain types of periodic payment. Sections 2 and 3 of the Act provide as follows:

> 2. Dividends shall, for the purposes of this Act, be deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment of the dividends is declared or expressed to be made.
>
> 3. All rents, annuities, dividends, and other periodical payments in the nature of income, whether reserved or made payable under an instrument in writing or otherwise, shall, like interest on money lent, be considered as accruing from day to day, and are apportionable in respect of time accordingly.

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[489] See, generally, *Widdifield on Executors' Accounts*, *supra*, note 390, at 236-52.

[490] *Apportionment Act*, R.S.O. 1980, c. 23.

As a result of the *Apportionment Act*, therefore, dividends, rent, interest, or other periodic payments are considered "as accruing from day to day" and are "apportionable in respect of time accordingly".[491] For example, where a testamentary trust is created, that portion of the receipts deemed to accrue daily before the date of death is treated as property to which the testator was entitled and, therefore, as part of his estate, while the balance that was deemed to accrue on a daily basis after the testator's death is viewed as income for the life beneficiary.

This apportionment formulation of the Act does not, however, apply to all forms of accruing revenue. It has been held that the income payment must be a periodic one and must have been declared or expressed for, or in respect of, a stated period of time.[492] Therefore, even if the income payment is rendered on a regular basis, if it does not represent a particular time period, such as a specific year or quarter, that payment is not apportionable under the Act.[493]

Apart from revenue payments that are made in respect of a specific period of time and that are, accordingly, apportionable under the provisions of the *Apportionment Act*, the distribution of income receipts is governed by rules formulated by the case law.[494] Generally speaking, the "non-apportionment" rule applies; that is, the case law imposes no duty to apportion receipts, even where it might be said that a receipt represents a combination of beneficial interests, unless the non-apportionment would produce a glaring injustice, in which case the court may make an equitable apportionment.[495] For example, trustees may sell shares cum dividend, that is, after a dividend has been declared, but before the record date,[496] so that a portion of the proceeds of sale received by trustees would represent a dividend or interest that would have been paid to the income beneficiary had the trustees remained as shareholders of record on the record date.[497] Normally, the entire proceeds of such a sale would be allocated to the capital account.[498] Further, apportionment does not take place when a payment totally accrues, and is therefore due, within the period of one person's beneficial interest, but is paid during his successor's time.[499]

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[491] *Ibid.*, ss. 2 and 3.

[492] *Ibid.* See, also, *Re Thomson*, [1947] O.R. 469, [1947] 3 D.L.R. 466 (H.C.J.), aff'd [1947] O.W.N. 907, [1948] 1 D.L.R. 304 (C.A.).

[493] *Re Coulson*, [1960] O.R. 1 (C.A.).

[494] See *Widdifield on Executors' Accounts*, *supra*, note 390, at 236-52.

[495] See *Re Maclaren's Settlement Trusts*, [1951] 2 All E.R. 414 (Ch. D.), at 420.

[496] The "declaration date" is the date of the formal announcement or approval of the dividend by the directors of the corporation. The "record date" is the date at which the shareholders' list is "frozen" for the purpose of identifying those shareholders who qualify for the payment. The "payment date" is the date when the dividend cheques are actually mailed: see *Widdifield on Executors' Accounts*, *supra*, note 390, at 242.

[497] See *Lewin on Trusts*, *supra*, note 25, at 359-61, for a detailed discussion of the common law rules of allocation of accruing dividends.

[498] The critical date for determining the allocation of dividends appears to be the record date; that is, whoever was beneficially entitled to the shares on the record date will receive the dividend. For example, if the life interest terminates after the declaration date, but before the record date, the dividend subsequently paid would be allocated to the capital account, as it would be the remainderman and not the life tenant who would be beneficially entitled to the shares on the record date: see *Widdifield on Executors' Accounts*, *supra*, note 390, at 242.

b. Other Jurisdictions

Legislation in terms similar to the Ontario *Apportionment Act* exists in all the Australian states, except Tasmania. This legislation deals with the allocation of periodic payments made with respect to a specific period of time.[500] Moreover, several of the Australian jurisdictions have introduced statutory provisions to minimize the possibility of inequity caused by the common law "non-apportionment" rule. The trustee legislation of New South Wales,[501] Victoria,[502] South Australia,[503] and Western Australia[504] contains a statutory provision that permits trustees to make an apportionment between capital and income where the payment is not declared in respect of a particular period of time. In particular, these Acts provide that, where any payment received or made by trustees includes payment for the right to receive any interest accrued from securities at the time of the sale or purchase, as the case may be, though the interest may not then be due, it shall be "deemed to have been received by the trustee as interest in respect of the period during which the interest so accrued".[505] In all the states, except Victoria, whose legislation is silent, the section may be ousted by a contrary intent expressed in the trust instrument.

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[499] For example, assume that A is entitled to a life interest in trust assets and that B is entitled to the assets on A's death. Assume also that the trust assets include a leasehold property and that the rent reserved by the lease is due and payable in advance. Assume further that rent to the value of $500.00 becomes due and payable during A's life, but is actually paid after A's death. In this situation, the $500.00 would be allocated exclusively to A's interest.

[500] See, generally, Meagher and Gummow, *supra*, note 93, at 390-95.

[501] *Trustee Act, 1925*, Stat. N.S.W. 1824-1957, Vol 11, No. 14, s. 24.

[502] *Trustee Act 1958*, Vict. Stat. 1958, No. 6401, s. 25 (3) and (4).

[503] *Trustee Act, 1936-1974*, S. Austl. Stat. 1837-1975, s. 13.

[504] *Trustees Act, 1962*, *supra*, note 95, s. 103.

[505] *Ibid.*, s. 103(1) and (2). Section 103 effectively reverses the common law rule expressed in *Re Maclaren's Settlement Trusts*, *supra*, note 495, and provides, in full, as follows:

> 103.—(1) Whenever any payment received by a trustee in respect of a sale of trust property, being securities bearing interest at a fixed rate, is, or includes, payment for the right to receive any interest accrued from those securities at the time of the sale, though that interest may not then be due, the amount of that accrued interest shall for the purposes of the trust be deemed to have been received by the trustee as interest in respect of the period during which the interest so accrued.
>
> (2) Whenever any payment made by a trustee out of trust money in respect of a purchase of any securities bearing interest at a fixed rate is, or includes, payment for the right to receive any interest accrued from those securities at the time of the purchase, though that interest may not then be due, the amount of that accrued interest when received on account of the trust shall, for the purposes of the trust, be deemed to have been so received as purchase money repaid.
>
> (3) Anything done by a trustee before the passing of this Act that would have been authorised by this section, if this section had then been in force, shall be deemed to have been authorised by this section.
>
> (4) The provisions of this section apply if and so far only as a contrary intention is not expressed in the instrument (if any) creating the trust, and have effect subject to the terms of that instrument.

In the United States, the Uniform Principal and Income Act[506] sets forth provisions that deal with the manner in which trustees should handle receipts and expenditures in a variety of circumstances. Regarding the apportionment of income, section 4 of the Act contains directions not unlike, in effect, the rules, both statutory and common law, in force in Ontario and referred to previously.[507] For example, receipts due, but not paid at a point when the entitlement to an asset changes, are payable to the person who was entitled to the enjoyment of the asset when the payment became due.[508] Corporate distributions to stockholders are treated as due on the "day fixed by the corporation for determination of stockholders of record entitled to distribution",[509] and, accordingly, whoever was the beneficial owner on the record date is entitled to the dividend payment. Moreover, other than corporate distributions, the Uniform Act, like the aforementioned Ontario apportionment legislation, treats receipts in the form of periodic payments that are not due at a particular transitional point as accruing from day to day and apportionable among the relevant interests accordingly.[510]

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[506] American Uniform Principal and Income Act, *supra*, note 481, at 429. The original Uniform Principal and Income Act was approved by the Conference of Commissioners on Uniform State Laws and the American Bar Association in 1931 and is in force, in some cases with modifications, in thirteen states: namely, Alabama (1939); Arizona (1951); Colorado (1955); Connecticut (1939); Kentucky (1956); Montana (1959); Oklahoma (1941); Pennsylvania (1972); Tennessee (1955); Texas (1943); Vermont (1957); Virginia (1936); and West Virginia (1953). A revised version of the Act was approved by the Commissioners and the Bar Association in 1962, and is in force, in some cases in modified form, in twenty-three states: namely, Arkansas (1971); California (1968); Florida (1975); Hawaii (1973); Idaho (1963); Illinois (1982); Indiana (1969); Kansas (1965); Maryland (1965); Michigan (1966); Minnesota (1970); Mississippi (1967); Nevada (1969); New Mexico (1969); New York (1967); North Carolina (1974); North Dakota (1969); Oregon (1975); South Carolina (1963); Utah (1980); Washington (1972); Wisconsin (1957); and Wyoming (1963).

[507] Section 4 of the American Uniform Principal and Income Act, *supra*, note 481, provides as follows:

> 4. [When Right to Income Arises; Apportionment of Income]
>
> (a) An income beneficiary is entitled to income from the date specified in the trust instrument, or, if none is specified, from the date an asset becomes subject to the trust. In the case of an asset becoming subject to a trust by reason of a will, it becomes subject to the trust as of the date of the death of the testator even though there is an intervening period of administration of the testator's estate.
>
> (b) In the administration of a decedent's estate or an asset becoming subject to a trust by reason of a will
>
> > (1) receipts due but not paid at the date of death of the testator are principal;
> >
> > (2) receipts in the form of periodic payments (other than corporate distributions to stockholders), including rent, interest, or annuities, not due at the date of the death of the testator shall be treated as accruing from day to day. That portion of the receipt accruing before the date of death is principal, and the balance is income.
>
> (c) In all other cases, any receipt from an income producing asset is income even though the receipt was earned or accrued in whole or in part before the date when the asset became subject to the trust.
>
> (d) On termination of an income interest, the income beneficiary whose interest is terminated, or his estate, is entitled to
>
> > (1) income undistributed on the date of termination;
> >
> > (2) income due but not paid to the trustee on the date of termination;
> >
> > (3) income in the form of periodic payments (other than corporate distributions to stockholders), including rent, interest, or annuities, not due on the date of termination, accrued from day to day.
>
> (e) Corporate distributions to stockholders shall be treated as due on the day fixed by the corporation for determination of stockholders of record entitled to distribution or, if no date is fixed, on the date of declaration of the distribution by the corporation.

c. *Conclusions*

We have considered whether a case can be made for amending the Ontario *Apportionment Act* or altering, by statutory provision, aspects of the case law rules that govern the apportionment of income when a change of ownership or entitlement occurs. However, on balance we are of the opinion that no change should be made to this area of the law.

We appreciate that the specific time period stipulated in the *Apportionment Act* may produce arbitrary results, but we are also convinced that it would be equally arbitrary if, for example, the Act were to require apportionment of a dividend where there is no evidence of the date when the profit was made. Accordingly, we have concluded that the common law "non-apportionment" rule should continue to apply to income receipts that are not made in respect of a specific period of time. Indeed, in relation to such payments, it seems to us that when trustees buy and sell assets over a period of time a working equity is done between the parties. Further, whenever a change occurs in the ownership of, or entitlement to, assets, the court, as mentioned, may always order apportionment when the non-apportionment rule would produce a glaring injustice. Therefore, we do not think it desirable to introduce provisions akin to those in force in the Australian States. We are strengthened in our opinion by the fact that the provisions of the American Uniform Act closely parallel the statutory and common law rules followed in this Province. Accordingly, we recommend the continuation of the Ontario *Apportionment Act*, without modification. Further, we recommend that income receipts not apportionable under the Act should continue to be allocated by the common law rules that are well established in this Province.

(ii) Duty to Convert Assets and Allocation of Income Pending Conversion

The second situation where difficulties appear to have arisen in connection with allocation of receipts occurs where trust assets comprise investments that are unauthorized by the trust instrument or by statute. Trustees are required to convert these assets into authorized investments, and difficulties occur concerning the allocation of gain from the unauthorized investments pending the conversion. This issue is addressed by what may be compendiously described as the rule in *Howe v. Lord Dartmouth*.[511]

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[508] *Ibid.*, § 4(b)(1) and (d)(2).

[509] *Ibid.*, § 4(e).

[510] *Ibid.*, § 4(b)(2) and (d)(3).

a. Ontario

At present, in Ontario, there are no statutory provisions that govern the conversion of trust assets or the allocation of income pending their conversion. Rather, trustees must look either to the trust instrument or to the common law[512] for guidance in these matters.

A duty to convert trust assets may arise in several ways. First, a settlor or testator may expressly provide in the trust instrument that the assets are to be sold and that the proceeds of sale are to be invested. Alternatively, the terms of the trust instrument and the nature of the dispositions may require this intention to be implied. In the absence of any such express or implied direction, the common law presumes a duty to convert trust assets in certain circumstances. This duty, known as the first branch of the rule in *Howe v. Lord Dartmouth*, provides that, where a testator bequeaths his residuary personal estate in trust for persons in succession, and the estate comprises assets that are wasting or unauthorized as investments, they must be sold and the proceeds of sale invested in authorized investments. The same rule applies where in such circumstances trust assets comprise reversionary interests.

The basis for this rule is that the law presumes that the testator intended to treat the income and capital beneficiaries equitably, and as wasting or hazardous[513] assets or reversionary interests cannot, by their nature, do so, the duty to convert into authorized investments arises.[514] Accordingly, it seems that the duty is not imposed where the assets are authorized as trustee investments.[515] The duty to convert may also be ousted where it can be demonstrated that the testator intended assets to be enjoyed *in specie*.[516] Moreover, the law implies *in specie* enjoyment with respect to certain types of asset, and, for this reason, the common law duty to convert does not apply to any asset settled by deed,[517] to any bequest of a specific asset,[518] or to any devise of land.[519]

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[511] *Supra*, note 17.

[512] See, generally, Waters, *supra*, note 8, at 690-712; Pettit, *supra*, note 65, at 290-302; *Lewin on Trusts*, *supra*, note 25, at 228-42; and Meagher and Gummow, *supra*, note 93, at 376-90.

[513] In *Re Lloyd*, [1949] O.R. 473, at 475, [1949] 4 D.L.R. 99, at 102 (H.C.J.), Wells J. stated that "all residuary personalty is deemed to be hazardous if it is not a trustee investment authorized by law or by the terms of the will".

[514] For example, some assets may be shares in a mining company whose mines will soon be exhausted, others may be shares in companies that compensate for their high risk by the payment of exceptionally high dividends, while others, like reversionary interests, have yet to fall into possession. The first two unfairly favour the income beneficiary, the last favours the remainderman.

[515] *Re Bentham* (1906), 94 L.T. 307.

[516] See Waters, *supra*, note 8, at 694-97.

Where a duty to convert trust assets arises, whether by express or implied intent, or as a result of the operation of the first branch of the rule in *Howe v. Lord Dartmouth*, the assets will, in all likelihood, not be sold immediately. Pending the conversion of the assets, trustees must ascertain the amount of income to which the life beneficiary is entitled. Ideally, where the assets are subject to an express duty to convert, the creator of the trust should stipulate whether, pending conversion, the life beneficiary is to receive the whole or any part of the income from the trust assets. The trust instrument might provide that the life beneficiary is entitled to the income that actually arises or to only a fair portion thereof, with any surplus to be capitalized.

If, however, the instrument is silent on this matter, or in cases where the duty to convert has been implied or imposed by law, the common law will infer, in the absence of a contrary intent, that pending conversion the income beneficiary is only entitled to a fair and reasonable income, even though the assets are actually producing a greater return:[520] this is known as the second branch of the rule in *Howe v. Lord Dartmouth*.[521] Any part of the actual income that remains after a fair and reasonable income has been paid to the income beneficiary is added to capital.[522] Alternatively, if there is a shortfall of income, the life beneficiary is entitled to have his fair and reasonable income recouped out of the proceeds of sale.[523] So too, with reversionary interests that produce no income, the law, as stated in *Re Earl of Chesterfield's Trusts*,[524] infers what a fair and reasonable income would have been, retroactive to the testator's death.

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[517] *In re Van Straubenzee*, [1901] 2 Ch. 779.

[518] *Hubbard v. Young* (1847), 10 Beav. 203, 50 E.R. 560.

[519] *Lottman v. Stanford*, [1980] 1 S.C.R. 1065, 107 D.L.R. (3d) 28, rev'g (1978), 2 E.T.R. 1 (Ont. C.A.). This case reverses a contrary line of cases in Ontario. See, for example, *Re Rutherford*, [1933] 4 D.L.R. 222 (Ont. C.A.). See, also, Waters, *supra*, note 8, at 700.

[520] Traditionally, since Victorian times in England, the rate has been 3% or 4%. In *Re Wood*, [1961] O.R. 573 (H.C.J.), the figure was put at 4%, but in *Re Smith*, *supra*, note 9, at 588, between 8% and 9 1/2% was being mentioned by the trial court as the return on "good quality bonds". In *Re Lauer and Stekl*, [1974] 6 W.W.R. 490, at 497, 47 D.L.R. (3d) 286, at 292 (B.C.C.A.), the Court directed a reference to hear evidence and recommend a percentage rate that would give a fair return to a life tenant, a decision that was affirmed: see 54 D.L.R. (3d) 159 (S.C.C.).

[521] The amount of fair income is calculated on the value of the assets as of one year after the testator's death, unless the assets are sold prior to that time, in which case the interest is based on the actual amount received by the trustees. If there is a power to postpone sale, the assets are valued at the date of the testator's death. The interest, whenever calculated, commences from the testator's death to the date on which the assets are sold: see Waters, *supra*, note 8, at 700-05.

[522] *In re Woods*, [1904] 2 Ch. 4.

[523] *In re Fawcett*, [1940] Ch. 402.

[524] (1883), 24 Ch.D. 643. The courts ascertain "the sum which, put out at interest at a certain rate per annum on the day of the testator's death, and accumulating at compound interest at that rate, with yearly rests would, together with such interest and accumulations, after deducting income tax, amount on the day when the reversion falls in or is

With respect to the duty to convert, there is an issue concerning whether the duty applies (because of the even hand principle) in circumstances other than the narrow circumstances associated with ***Howe v. Lord Dartmouth***, or whether the even hand principle will require conversion in other circumstances as well. Over time, and as a result of multiple applications of these rules, the principle of maintaining an even hand among successive beneficiaries has frequently been associated exclusively with ***Howe v. Lord Dartmouth*** and its corollaries.[525] In England, for example, the development of the even hand rule beyond the nineteenth century jurisprudence has been almost non-existent.[526] This has not, however, been the experience in Ontario, where the even hand rule has received more attention.[527] In particular, the decision of the Ontario Supreme Court in ***Re Smith***[528] marked a change in the courts' attitude to the impartiality doctrine.[529]

In ***Re Smith***, the corporate trustee refused the request of the life beneficiary to sell low yielding investments. The investments had been settled in an ***inter vivos*** trust. In response to the intransigence of the trustee, the life beneficiary instituted an action to remove the trustee. Although the trustee was empowered by the trust document to retain the low yielding investments and it was uncertain if it even had the power to sell them, the Court ordered the trustee removed, stating that, "[u]nless there is some provision in the trust agreement which prevents the trustee from [maintaining an even hand], it seems . . . inescapable that the trustee is in breach of his well-recognized duty. . . ."[530] The trustee was removed because it was "impossible to restore confidence in the trustee with respect to the future administration of [the] trust".[531] Specifically, the trustee had been unduly influenced by a consultation it made with the settlor subsequent to the life beneficiary's request.

The general view is that ***Re Smith*** articulated the even hand rule and applied it in a novel fashion.[532] The doctrine of impartiality was elevated to a dominant position in the court's analysis, and the discretion of the trustee was successfully challenged on this broad principle. Moreover, the duty to convert was extended well beyond the constraints of ***Howe v. Lord Dartmouth***. Nonetheless, the current status of ***Re Smith*** is debatable.

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realised to the sum actually received; the sum so ascertained is treated as representing the corpus, and the difference between that sum and the sum actually received, the income": see ***Lewin on Trusts***, ***supra***, note 25, at 240-41.

[525] Cullity, "Trustees' Duties, Powers and Discretions – Exercise of Discretionary Powers", in ***Law Society of Upper Canada - Special Lectures 1980*** (1980) 13, at 27. The corollaries referred to involve apportioning or otherwise adjusting receipts between capital and income beneficiaries.

[526] ***Ibid.***, at 29.

[527] Scane, "Comment on ***Re Katz***" (1981), 5 Estates 277, at 294.

[528] ***Re Smith***, ***supra***, note 9.

[529] Hogg, "Comment on ***Lottman v. Stanford***" (1981), 5 Estates 181, at 187. See, also, Oosterhoff, "The Application of the Rule in ***Howe v. Earl of Dartmouth*** to Residuary Real Property" (1981), 5 Estates 127.

[530] ***Supra***, note 9, at 589 ([1971] 1 O.R.).

[531] ***Ibid.***

[532] Hogg, ***supra***, note 529; Cullity, ***supra***, note 525, at 29; and Smith, "Does the Trustee's 'Duty of Impartiality' Extend to Real Property?" (1981), 59 Can. B. Rev. 687, at 700.

In *Lottman v. Stanford*,[533] the Supreme Court of Canada reversed a decision of the Ontario Court of Appeal, which had asserted that *Howe v. Lord Dartmouth* was applicable to underproductive realty on the basis of the general principle of impartiality. On the one hand, the Court of Appeal was of the view that, as the social and economic environment that spawned the restrictions of *Howe v. Lord Dartmouth* no longer existed, the fair treatment of beneficiaries could only be achieved by a more dynamic judicial attitude.[534] The Supreme Court of Canada, on the other hand, was of the opinion that the lower Court's decision was tantamount to judicial legislation. While the unwillingness of the Supreme Court of Canada to follow and apply the reasoning of *Re Smith* has indicated to some that it has been overruled,[535] *Re Smith* continues to be cited as authority for a broader principle of impartiality than that enunciated in *Howe v. Lord Dartmouth*.[536]

b. Other Commonwealth Jurisdictions

For the most part, other Commonwealth jurisdictions, like Ontario, adhere to the above-stated common law rules. However, the trustee legislation of New Zealand[537] and Western Australia[538] contains a provision that modifies the second branch of the rule in *Howe v. Lord Dartmouth*, which rule is to the effect that a life beneficiary is entitled only to a fair and reasonable income pending conversion of a trust asset. Section 105 of the Western Australia Act, which is in terms similar to the New Zealand provision, provides as follows:

> 105.—(1) Where, under the will of any person any real or personal property, included (either by specific or general description) in a residuary gift is settled by way of succession, then, notwithstanding that the property may be of a wasting, speculative or reversionary nature, –
>
> (a) pending any sale, calling in, or conversion of the settled property, the whole of the net income of the property actually producing income

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[533] *Supra*, note 519. In *Lottman v. Stanford*, an income beneficiary who was dissatisfied with her income applied to the court seeking the conversion of underproductive realty. At the trial level, the question of the application of *Howe v. Lord Dartmouth* to realty was left open. The Ontario Court of Appeal held that *Howe v. Lord Dartmouth* was applicable to underproductive realty, but was reversed on this point by the Supreme Court of Canada.

[534] *Lottman v. Stanford*, *supra*, note 519, at 14 (2 E.T.R.). See, also, Scane, *supra*, note 527, at 284, and Smith, *supra*, note 532, at 693.

[535] See Hogg, *supra*, note 529, at 194.

[536] See, for example, *Re Hopkins* (1982), 132 D.L.R. (3d) 671 (Ont. H.C.J.), aff'd (1982), 17 A.C.W.S. (2d) 299 (Ont. C.A.). Rutherford J., at 682, while acknowledging that the decision of the Supreme Court of Canada in *Lottman v. Stanford* put beyond doubt that the rule in *Howe v. Lord Dartmouth* does not apply to real property, stated that "that does not settle the issue before me", and cited *Re Smith* with approval for the general proposition that the duty upon trustees to maintain an even hand must still be considered.

[537] *Trustee Act 1956*, *supra*, note 227, s. 85.

[538] *Trustees Act, 1962*, *supra*, note 95, s. 105.

> shall be applied as income and no part thereof shall be apportioned to capital; and
>
> (b) on any sale, calling in, or conversion of the settled property, or on the falling in of any reversionary property, no part of the proceeds of the sale, calling in, conversion or falling in shall be applied as past income.
>
> (2) This section applies only in respect of the wills of persons who die after the commencement of this Act.
>
> (3) The provisions of this section apply if and so far only as a contrary intention is not expressed in the will of the deceased, and have effect subject to the terms of that will.

In effect, this provision prescribes that, unless a contrary intention is expressed in the will, pending conversion of any asset, whether of a wasting, speculative, or reversionary nature, the life beneficiary shall receive the actual income thereof and no part shall be apportioned to capital. Further, upon conversion no part of the proceeds shall be applied as past income by way of adjustment.

c. Conclusions

As we have stated, the duty to convert unauthorized assets may arise by the express or implied direction of the creator of the trust, or be imposed by law under the first part of the rule in *Howe v. Lord Dartmouth*. Where a duty to convert does arise, the income beneficiary, pending conversion, is entitled to a fair and reasonable income, a result that follows from the second branch of the rule in *Howe v. Lord Dartmouth* and, where the trust assets comprise a reversionary interest, the rule in *Re Earl of Chesterfield's Trusts*.

After much debate, we have concluded that we are in basic agreement with the second branch of the rule in *Howe v. Lord Dartmouth*, that is, with the present approach for determining the mode of apportionment of the income of assets pending conversion, including the time of notional conversion. We are of the view, however, that the first part of the rule in *Howe v. Lord Dartmouth*, dealing with the circumstances in which a duty to convert arises, is too restrictive in its application. We prefer a broader statement than that expressed by the present case law of the duty to convert trust assets in order to maintain an even hand among beneficiaries.

In arriving at our conclusion concerning the second branch of the rule, we considered, but rejected, the approach of vesting trustees with a general discretion to make such apportionments as seem to them to be fit in all the circumstances. In this respect, we share the view of the Queensland Law Reform Commission, which also rejected this approach on the basis that "it is hard to see how a trustee could ever justify exercising such a discretion in a manner substantially different from the manner settled in *Howe v. Lord Dartmouth*".[539]

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[539] Queensland Report, *supra*, note 472, at 77.

We prefer that, pending conversion of unauthorized assets, the income beneficiary should be entitled to a fair and reasonable income, rather than the actual income as is provided in the New Zealand and Western Australia provisions cited previously.[540] In this regard, we again concur with the remarks made by the Queensland Law Reform Commission that "it is difficult to accept that the tenant for life should be allowed to take the entire income of wasting assets".[541] Since, as that Commission pointed out, the provisions of the New Zealand and Western Australia Acts do not abrogate or abridge the general duty of the trustee to maintain an even hand between life tenants and remaindermen, "the effect of [these] provisions would appear to be that a greater compulsion to sell wasting assets is placed on the trustees than formerly".[542] Further, in our opinion, the "fair income" for the life beneficiary should be commensurate with the current rate of interest being paid on court funds. Accordingly, we recommend that there should be no change in the law relating to rules associated with the second branch of the rule in *Howe v. Lord Dartmouth*, that is, the law with respect to the mode of apportionment, including, in those circumstances where the issue arises, the time of notional conversion of assets, and the allocation of a fair and reasonable income pending conversion of assets to the income beneficiaries.

Turning to the role of intention as it affects both branches of the rule in *Howe v. Lord Dartmouth*, there is no doubt that the common law rules in this area of the law have not been popular with Canadian practitioners. Indeed, the response of most draftsmen today is to exclude their operation in the trust instrument, on the basis that the average testator creating a testamentary trust intends to favour his life beneficiary, and that in many instances the amount of income involved does not justify the application of the rules. Nonetheless, the difficulty that practitioners seem to have experienced does not, for the most part, concern the mode of apportionment established by the rules in *Howe v. Lord Dartmouth* and *Re Earl of Chesterfield's Trusts*, but rather relates to the ascertainment of intention. In this respect, it will be recalled that both the duty to convert and the entitlement of the life beneficiary to a fair and reasonable income will only arise in the absence of a contrary intention.

When a testator has not expressly directed a sale of his residuary estate, the question arises whether he has intimated, so far as evidence is adducible, that he does indeed intend the assets to be enjoyed *in specie*, or the income beneficiary to have the actual income produced by assets that are wasting or hazardous and to assume the risk that reversionary interests may never fall into possession. The testator may have intended *in specie* enjoyment, for example, in a case where he had an attachment to the assets in question and intended them to be retained as trust property, or where he intended to prefer his widow as income beneficiary. However, the task of adducing satisfactory evidence may be formidable. The language of the entire will must be construed, each clause read independently and as part of the whole, and it has more than once been the case that courts of appeal have been divided on the issue of proper construction.[543] Moreover, even in those cases where a power to retain the original assets is contained in the trust instrument, this power may not necessarily enable trustees to retain these assets indefinitely and to pay to the income beneficiary the actual income that arises: the courts have interpreted the power, not as one of retention, but merely as a device to assist in the process of investment.[544]

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[540] See *supra*, this ch., sec. 4(c)(ii)b.

[541] Queensland Report, *supra*, note 472, at 76.

[542] *Ibid.*, at 76-77.

Alternatively, the testator or settlor may have directed a sale of the assets transferred to trustees. Although the issue of *in specie* enjoyment is settled, the question that remains is whether evidence can be adduced to persuade a court that the income beneficiary was intended to have the actual income generated by the assets prior to conversion, or whether, in the absence of such evidence, a notional conversion to authorized investments was intended from the inception of the trust.[545]

The testator or settlor, while having directed a sale of trust assets, may also have authorized trustees to postpone the conversion at their discretion. Does such a postponement power reveal an intention that the income beneficiary is to have the actual benefit of wasting and hazardous assets, or merely that trustees should be free to choose the best market timing for sale, without fear of incurring liability for breach of trust for not having sold at an earlier date? This latter interpretation appears favoured by at least those Commonwealth jurisdictions that have conferred statutory powers of postponement upon trustees for sale.[546] It has also been held that a power to postpone conversion, accompanying a direction to convert, does not demonstrate an intention that the income beneficiary is to have the entire income that arises prior to sale, whereas a power to retain existing investments does carry this implication, whether or not there is a direction to convert.[547] Yet the Supreme Court of Canada has held that a direction to convert, accompanied by a power to postpone and a power to retain existing investments, establishes only an intention that trustees should be free to choose the best market moment for sale. Such a clause says nothing about beneficial entitlement to income prior to sale.[548]

This discussion highlights the difficulties that trustees face in determining the intention of the creator of a trust regarding the conversion and the allocation of income of unauthorized investments. It may be contended that the construction of an instrument that leaves these matters open or ambiguous should be continued to be determined by the common law. However, after much thought we have concluded that legislative intervention in this area of the law would be advantageous. At the very least, a statutory provision could alleviate the present unsatisfactory situation by clearly stipulating that, unless the instrument expressly provides to the contrary, if a trust for successive beneficiaries contains unauthorized investments, whether or not a direction to convert is contained in the instrument, trustees are required to convert the unauthorized into authorized investments at the first advantageous moment, and pending the conversion pay to the income beneficiary a fair income out of any greater actual income arising. Such a provision would remove doubts concerning the testator's or settlor's intention that are attendant upon the construction of particular directions in the instrument; testators or settlors would have to state expressly whether the original assets are to be enjoyed *in specie* and whether it is intended to favour the life beneficiary. In this regard, we are of the view that the nature of the asset should not in itself dictate whether it is to be held *in specie*; that is, unless the instrument expressly provides otherwise, land, as with personalty, should be subject to conversion. Similarly, a direction in the trust instrument to retain or postpone or otherwise delay the sale of an asset should not of itself constitute an express provision to the contrary.

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[543] See, for example, *Royal Trust Co. and McMurray v. Crawford*, [1955] S.C.R. 184, [1955] 2 D.L.R. 225. See, also, Waters, *supra*, note 8, at 695-97.

[544] See *Fales, Wohlleben v. Canada Permanent Trust Co.*, *supra*, note 1, and *Re Wright* (1977), 14 O.R. (2d) 698, 74 D.L.R. (3d) 504 (H.C.J.).

[545] The same issue arises with respect to reversionary interests; when they eventually fall into the trust, was it the intention of the creator of the trust that the income beneficiary should be entitled to a portion of the capital as accumulated past income, or merely to the interest arising from the investment of the capital?

[546] See Meagher and Gummow, *supra*, note 93, at 378.

[547] See *Royal Trust Company and McMurray v. Crawford*, *supra*, note 543, and *In re Nicholson*, [1909] 2 Ch. 111.

[548] See *Fales, Wohlleben v. Canada Permanent Trust Co.*, *supra*, note 1, and *Re Wright*, *supra*, note 544. See, also, *Re Billes* (1983), 42 O.R. (2d) 110, 148 D.L.R. (3d) 512.

However, while this approach to reform of the rule in *Howe v. Lord Dartmouth* would clarify the position of trustees with respect to the retention of unauthorized investments, we are of the view that, with respect to the first branch of the rule, it does not go far enough. It is a basic principle of trust law that beneficiaries of the trust are to be treated equally by trustees, unless the settlor or testator has indicated to the contrary.[549] Today, the impartial treatment of successive beneficiaries poses difficulties for many trustees, because individual investments tend to favour either an income beneficiary or a capital beneficiary, aside from whether the investment is authorized or unauthorized. As recent cases have indicated, trustees have had to grapple with this dilemma and, while courts in Ontario have been willing to apply a general duty of impartiality, subject, of course, to the wishes of the settlor or testator, to assist trustees in their task of maintaining an even hand among beneficiaries (even where the assets consist of otherwise authorized investments),[550] other courts continue to adhere to the nineteenth century jurisprudence of *Howe v. Lord Dartmouth*.[551] We are of the view that the approach adopted by the Ontario courts, and, in particular, the general principle enunciated in *Re Smith*,[552] should be the primary focus of trustees when deciding whether successive beneficiaries are being treated equitably; the test should not be whether the particular asset is realty or personalty, specific bequest or residuary, unless the creator of the trust has expressly indicated that one beneficiary is to be favoured over another.

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[549] Waters, *supra*, note 8, at 690-91.

[550] See *Re Smith*, *supra*, note 9, and discussion *supra*, this ch., sec. 4(a).

[551] See *Lottman v. Stanford*, *supra*, note 519 and accompanying text.

[552] *Supra*, note 9. Arnup J.A., at 542 ([1971] 2 O.R.) speaking for the Court, stated that "the trustee under this document was obliged to follow the well-recognized principle applicable to a trust fund where there are interests for life and interests in remainder, namely, that he must maintain an even hand between the respective interests of both classes of beneficiaries".

Releasing the general principle of impartiality from the confines of the rule in *Howe v. Lord Dartmouth* has both judicial and academic support,[553] and we are of the opinion that a concise statement of the expanded principle would be welcomed. In effect, *Howe v. Lord Dartmouth* applied the even hand rule in respect of a limited type of property – unauthorized residuary personalty that was an original trust asset – and for limited circumstances – testamentary dispositions. The contemporary view is that the even hand principle should be applicable to all types of property – personalty and realty and whether it be an original or subsequently acquired trust asset – and to all types of disposition – testamentary and *inter vivos* – and should apply whether the property is authorized or unauthorized as a trustee investment, unless, of course, the creator of the trust expressly states to the contrary.

Accordingly, we recommend that the revised Act should provide that trustees shall act impartially as between income and capital beneficiaries, having regard to each item of trust property, whatever the nature of the property, and whether it is an original asset or an asset that is acquired subsequently, further to an authorization in the trust instrument or conferred by statute.[554] In addition, we recommend that this recommendation should apply to all trusts, unless the trust instrument expressly provides otherwise.[555]

(iii) Disposition of Insurance Proceeds

We have recommended previously that trustees should be able to insure trust property against loss or damage and any other risk or liability.[556] We also have discussed the payment of insurance premiums, and recommended that trustees should be able to pay for any outgoing, which would include insurance premiums, from income or capital, or wholly or partly from each, as appears to them to be in accordance with sound business practice and in the best interests of the trust beneficiaries.[557] In addition, we recommended that trustees should be given a discretion to apportion any payment or expenditure for any outgoing, such as insurance premiums, between the income and capital accounts, as they consider just and equitable in all the circumstances and having in mind the need to maintain an even hand among the beneficiaries.[558] We now turn to consider the matter of the allocation of the proceeds received by trustees under a policy of insurance.

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[553] See, for example, *Re Welsh; Re Thompson and Morrisson* (1980), 6 E.T.R. 257 (Ont. H.C.J.), at 274 where Holland J. stated that *Re Smith* represented "a forward advance . . . in which the intention of the testator and the obligation of the trustees to treat fairly between successive interests are the paramount considerations". See, also, *Re Hopkins*, *supra*, note 536. See, further, Smith, *supra*, note 532, at 700-11; Scane, *supra*, note 527, at 291; and Hogg, *supra*, note 529, at 187-90.

[554] Draft Bill, s. 39(1).

[555] *Ibid.*, s. 39(2).

[556] See *supra*, this ch., sec. 3(d)(vi), and Draft Bill, s. 35(*g*).

[557] See *supra*, this ch., sec. 4(b)(iv), and Draft Bill, ss. 40(2) and 1(*j*).

At present, the Ontario *Trustee Act* does not address the issue of the disposition of proceeds received from insurance policies. Rather, the allocation of insurance proceeds to either the income or capital accounts, or to reinstate, rebuild or repair the lost or damaged trust property will be governed by specific provisions in the trust instrument or, in the absence of such provisions, by the common law.

Generally speaking, unless it is clear from the language of the trust instrument that the creator of the trust intended the insurance proceeds to be applied to the reinstatement or repair of the lost or damaged trust property, or to any other purpose, the proceeds are treated in the same manner as the asset on behalf of which they are payable, that is, as capital of the trust to be invested by the trustees in order to earn income for the income beneficiary.[559] There is a suggestion in early case law that insurance proceeds may be paid to the life tenant,[560] but this position has been the subject of criticism.[561]

The trustee legislation of England,[562] the Australian states,[563] and New Zealand[564] contains provisions that deal with the disposition of proceeds received from insurance policies. Although there are differences in legislative expression, these jurisdictions provide that money received under a policy of insurance is capital for the purposes of the trust.[565] In addition, subject to obtaining the consents of any person whose consent is required by the trust instrument for the investment of money, the trustees may apply the insurance proceeds to rebuild, reinstate, replace, or repair the lost or damaged trust property.[566] If the insurance money has been paid into court, the Acts provide that any application of the money for rebuilding, etc., shall be under the direction of the court.[567]

We agree with the position taken by the legislation in these Commonwealth jurisdictions that insurance proceeds should be treated as capital for the purposes of the trust. In effect, the insurance moneys are intended to replace, as far as possible, a lost or damaged capital asset of the trust. Subject to the terms of the trust and, in particular, the power of investment, trustees should utilize the insurance proceeds in the same manner as they would any capital asset, namely, to generate income. In this way, the capital beneficiary will receive, in time, the insurance proceeds, while the income beneficiary will have the benefit of the income produced from the proceeds. We cannot contemplate any general situation where insurance proceeds should be treated as income of the trust, but it is always open for a testator or settlor to make such a provision in the trust instrument. Accordingly, we recommend that the revised *Trustee Act* should provide that, where a contract of insurance has been entered into and any premiums have been paid by the trustees, the money receivable by the trustees under the policy shall be held by them as capital money of the trust, subject to the terms of the trust, including the power of investment.[568]

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[558] See *supra*, this ch., sec. 4(b)(iv), and Draft Bill, ss. 40(1) and 1(*j*).

[559] *Widdifield on Executors' Accounts*, *supra*, note 390, at 134-35.

[560] *In re Quicke's Trusts*, [1908] 1 Ch. 887.

[561] *Widdifield on Executors' Accounts*, *supra*, note 390, at 135.

[562] *Trustee Act, 1925*, *supra*, note 31, s. 20.

[563] See Meagher and Gummow, *supra*, note 93, at 450-54, for a summary of the legislative provisions in the various states of Australia.

[564] *Trustee Act 1956*, *supra*, note 227, s. 25.

[565] See, for example, English *Trustee Act, 1925*, *supra*, note 31, s. 20(1); Western Australia *Trustees Act, 1962*, *supra*, note 95, s. 47(1); Queensland *Trusts Act 1973*, *supra*, note 229, s. 48(1); and New Zealand *Trustee Act 1956*, *supra*, note 227, s. 25(1).

[566] See, for example, English *Trustee Act, 1925*, *supra*, note 31, s. 20(4); Western Australia *Trustees Act, 1962*, *supra*, note 95, s. 47(4); Queensland *Trusts Act 1973*, *supra*, note 229, s. 48(3); and New Zealand *Trustee Act 1956*, *supra*, note 227, s. 25(4).

[567] *Ibid.*

We are also of the view that, like the position under the legislation of England, Australia, and New Zealand, trustees should be able to apply the insurance proceeds to rebuild, reinstate, replace, or repair the lost or damaged trust property. However, unlike the Commonwealth legislation, we have concluded that the consent of the court should be obtained before insurance proceeds are so applied, except in the case of minor repairs to the trust property. The rebuilding, reinstating, replacing or major repair of trust property will, in most cases, involve the application of substantial sums of money. In the interest of harmony among the successive beneficiaries, the consent of the court should be obtained to ensure that the insurance proceeds are applied in the most appropriate manner. Accordingly, we recommend that the revised Act should provide that all or part of the money held by the trustees as capital money of the trust, and representing insurance proceeds, may be applied by them, with the consent of the court, for rebuilding, reinstating, replacing or the major repair of trust property that has been lost or damaged.[569]

One matter that is not addressed specifically by the legislation of other Commonwealth jurisdictions is what is to happen when, for whatever reason, a life tenant or remainderman takes out his own policy of insurance on trust property and asserts that moneys payable under the policy belong to him and not to the trust. Under the case law, if a life tenant does insure a trust asset, he does so voluntarily, and therefore for his own benefit.[570] However, section 127 of the *Insurance Act*[571] makes it clear that, if there is more than one contract of insurance covering the same interest, each of the insurers is liable to the insured for its rateable proportion of the loss, unless otherwise expressly agreed in writing between the insurers. Therefore, if both the trustees and the beneficiary insure the same trust asset, the trustees, upon the occurrence of any loss or damage to the asset, would only be entitled to collect a *pro rata* proportion of the proceeds under their policy. If the beneficiary asserted that the *pro rata* share of proceeds that he received from his insurer belonged to him, the trust would be inadequately compensated for the loss or damage occurring to the trust asset.

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[568] Draft Bill, s. 37(1).

[569] *Ibid.*, s.37(2).

[570] *Gaussen v. Whatman* (1905-06), 93 L.T. 101 (Ch. D.), at 103.

[571] R.S.O. 1980, c. 218.

We are of the opinion that all insurance policies covering risks attaching to the trust property should be the sole concern of the trustees. Moreover, if loss or damage does occur to the property, the trust should receive the full benefit of available insurance proceeds. If a beneficiary takes out his own insurance, the advantage of all insurance on trust property should accrue to the trust. Accordingly, we recommend that the revised Act should provide that, where a beneficiary of a trust enters into a contract of insurance against loss of, or damage to, any trust property, or any other risk or liability to which the trustees are or might be exposed, whether or not the beneficiary is required by the trust instrument or by a third party so to do, the money received under the policy should be held as capital money and assigned by the insured to the trustees.[572]

We recognize, however, that, had the trustees, rather than the beneficiary, been the insured they would, under our previous recommendations, have charged the premiums proportionately to the income or capital accounts as they saw fit. Therefore, when the proceeds of insurance on trust property received by a beneficiary are assigned to the trustees, the trustees should ensure that the beneficiary is put in the same position he would have occupied, *vis-à-vis* the allocation of insurance premiums, had the trustees been insured. Accordingly, we recommend that, in the event that money is received under a contract of insurance entered into by a beneficiary, the insured beneficiary should be reimbursed by the trustees for the amount of such premium payment or payments as the trustees in their discretion consider reflects the interests of beneficiaries other than the insured in the trust property.[573]

Finally, we wish to mention two other matters that should be addressed in relation to the disposition of insurance proceeds. First, in the event that the insured trust property is subject to a mortgage or a lease or other charge or obligation, special rights of a mortgagee, lessor, or lessee in relation to the application of insurance moneys received on the property may be involved. The Commonwealth provisions referred to previously provide that any such special rights should govern,[574] and we agree with this position. Accordingly, we recommend that nothing in our previous recommendations concerning the disposition of insurance proceeds should affect the rights of a mortgagee, lessor, lessee or other person in money received from an insurer of trust property.[575] Secondly, as under the Commonwealth provisions referred to previously,[576] we are of the view, and recommend, that our proposals concerning the disposition of insurance proceeds should only apply to money received by the trustees after the revised Act comes into force, so as not to affect the allocation of insurance proceeds received before that date that might not be in conformity with the revised Act.[577]

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[572] Draft Bill, s. 37(3)(*a*).

[573] *Ibid.*, s. 37(3)(*b*).

[574] See, for example, English *Trustee Act, 1925*, *supra*, note 31, s. 20(5); Western Australia *Trustees Act, 1962*, *supra*, note 95, s. 47(5); Queensland *Trusts Act 1973*, *supra*, note 229, s. 48(6); and New Zealand *Trustee Act 1956*, *supra*, note 227, s. 25(5).

[575] Draft Bill, s. 37(4).

[576] See, for example, English *Trustee Act, 1925*, *supra*, note 31, s. 20(6); Western Australia *Trustees Act, 1962*, *supra*, note 95, s. 47(6); Queensland *Trusts Act 1973*, *supra*, note 229, s. 48(8); and New Zealand *Trustee Act 1956*, *supra*, note 227, s. 25(6).

(d) SEPARATION OF INVESTMENT AND ALLOCATION DECISIONS

So far in this chapter, we have considered the administrative powers of trustees, including the investment power, and the power of allocation of receipts and outgoings between income and capital beneficiaries. It will be apparent from this discussion that, in making investment decisions, and in allocating receipts and outgoings, trustees must, in the absence of directions to the contrary, endeavour to hold the balance between successive beneficiaries. At present, in order for trustees to make prudent investment choices that will ensure the maintenance of an even hand, certainty concerning the extent and nature of income and capital return on investments is essential. When a trustee invests in such assets as rental buildings, mortgages, bonds, or preferred shares, indeed, in any debt or fixed-interest security, few difficulties arise concerning whether a particular receipt represents an income or a capital payment. Moreover, should the trust fund be so invested, trustees will know the level of income that can be expected, and, except in relation to land and buildings that will probably appreciate, the amount of the capital return. However, this is not the case with all investments, and, while other sources of revenue may present problems of classification, corporate distributions merit, in our opinion, particular attention. It is to this topic that we now turn.

(i) Corporate Distributions

A corporation can distribute profits in a variety of forms that take no account of the fact that a particular shareholder may be a trustee for both income and capital beneficiaries. Trustees must not only be concerned with the level of risk and the profitability of an investment, but, in order to assess whether the investment in question treats the income and capital beneficiaries fairly, they must also determine whether a particular distribution is to be classified as "income" or as "capital". As a result, when trustees choose an investment they must be guided not only by the objective quality of the investment in the prevailing market conditions, but also by whether the investment will enable them to fulfill their duty to maintain an even hand.[578] Accordingly, the classification of corporate distributions is a matter of importance, and we wish to consider whether the revised Act could assist trustees with these determinations, and, more fundamentally, could minimize the impact of even hand considerations upon the investment decisions of trustees.

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[577] Draft Bill, s. 37(5).

[578] This point is well illustrated by the case of *Re Smith*, *supra*, note 9. Although the oil company shares were an excellent investment, the gain was coming in the form of capital appreciation, rather than cash dividends. The income beneficiary was demanding the sale of these shares in order that the proceeds might be reinvested in some other authorized investment that would bring a fair income return. The Court agreed, and held that the trustee was in breach of the duty to act impartially by retaining the oil shares.

a. Ontario

Trustees in Ontario, as in other Commonwealth jurisdictions, must rely upon common law rules to classify distributions that are received from corporations.

When trustees invest in common shares, they are entitled as shareholders to nothing more than the right to participate in any trading profits that the corporation may make in the future. All that a shareholder can demand, if profits are made, and if a distribution takes place, is that he receive, proportionate to his shareholding, the same amount and type of distribution as any other shareholder of the class of shares in question.

It is a fundamental principle of company law in Canada that, unless a corporation is in liquidation or engaged in the reduction of capital, it may not return capital to its shareholders; if it chooses to make a distribution, it must be from profits.[579] However, a corporation has the power to utilize and distribute profits in various ways. Generally, a corporation will make regular distributions of profits to shareholders in the form of cash dividends, or, if it chooses to distribute extra profit, a "cash bonus" or "bonus" may be given to shareholders. The receipt of dividends in this fashion is normally treated as income by trustees, for the benefit of the life beneficiaries.

However, there is no obligation on a corporation to distribute its profits to shareholders. Moreover, even if there is a distribution of corporate profits, it need not take the form of cash dividends. Rather, a corporation may choose to retain and capitalize profits; as a result, although a shareholder does not receive cash-in-hand, the value of his shares on the market will increase commensurately. In recognition of the increase in value of the shares, a corporation may distribute to shareholders rights in the new capital increment. These rights may take the form of an issue of additional shares or preferential options to purchase new shares. The corporation may also issue new shares with the proviso that shareholders may allow a bonus dividend to be applied as payment, in whole or in part, for the new shares. It is at this juncture that the common law distinguishes between profits distributed directly as a cash dividend, and profits that have been capitalized and distributed as a capital entitlement; the former, as mentioned, accrue to the benefit of the life beneficiary, while the latter are treated as capital to which the remainderman is entitled.

Initially, in 1887, the English courts adopted the test of intention to classify corporate distributions.[580] The critical question was whether the corporation paid, and intended to pay, a cash dividend, or appropriated, and intended to appropriate, the profits to an increase in the capital stock of the corporation. Thereafter, it was widely accepted that the decisive element of the test was whether the corporation intended to distribute a money payment or to capitalize profit. However, in 1930, the Privy Council, in *Hill v.*

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[579] See, for example, *Re Keating Estate*, [1934] S.C.R. 698, [1934] 3 D.L.R. 745.

[580] *Bouch v. Sproule* (1887), 12 A.C. 385 (H.L.).

Permanent Trustee Co. of N.S.W. Ltd.,[581] held that it was not a matter of the intention of the corporation, but rather what the corporation actually did that decided the matter.[582] If a corporation capitalized profit, the receipt was capital in the hands of trustees; if it "gave away" profit by distributing cash, the receipt was to be treated as income.

In England, therefore, the test is expressed in terms of the real character and substance of the corporate action; that is, the "form" of the distribution. In Canada, the "form" test, without embellishment, is also the governing rule. This was put beyond doubt by two celebrated cases in the Supreme Court of Canada in 1956, namely, *Re Waters*[583] and *Re Hardy*.[584] As a result of these decisions and their subsequent interpretation, it can now be said that, however the corporation describes its actions, if cash is distributed it is to be classified as income,[585] but if profit is retained and capitalized, even if the new shares are redeemable, the distribution must be treated as capital in the hands of the trustees. Accordingly, today, normal cash dividends are alone classified as income. Redeemable preferred stock, bonus shares, rights to purchase stock, and the proceeds of compulsory sales and expropriations are all classified as capital.

It should be noted, however, that trust instruments often authorize trustees to allocate receipts, including corporate receipts, between income and capital beneficiaries at the trustee's discretion, subject, of course, to the duties of care and of impartiality. It is only where the trust instrument is silent that the corporate action determines the issue.

b. United States

In the United States over the years, a number of approaches have been taken in different jurisdictions to the appropriate method of classifying corporate distributions.[586]

One of the earliest approaches was the Pennsylvania, or American, rule, first formulated in 1857.[587] This rule, which sought to relate corporate distributions to income and capital beneficiaries in a manner that would achieve an equitable apportionment, considered both the source of distribution and the period of time during which a corporate profit had been earned. If the source was profit, and if the profit was earned during the subsistance of the interest of the income beneficiary, the distribution was treated as income, while any distribution of earnings accumulated prior to the creation of the life interest belonged to and formed part of the capital.

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[581] [1930] A.C. 720 (P.C.) (Aust.).

[582] *Ibid.*, at 734.

[583] [1956] S.C.R. 889, 4 D.L.R. (2d) 673.

[584] [1956] S.C.R. 906, 4 D.L.R. (2d) 721.

[585] An extraordinary cash dividend could still be ambiguous, one would have thought.

[586] See, generally, Scott, *supra*, note 140, §§ 236-236.16, at 1967-2023.

[587] *Earp's Appeal*, 28 Pa. 368 (1857).

For much of the nineteenth century this rule was popular, particularly among the theorists, but in practice it became unworkable. The real difficulty was not the complex accounting that the rule involved, but the fact that, since a corporation normally pays its distributions from accumulated surplus, it was impossible to determine the source of the profit or the period during which the profit was earned by the corporation. A method of determining the time of acquisition of surplus was devised that involved valuing all the corporation's assets at the commencement of the income beneficiary's interest, and determining the proportionate share interest in these assets that was originally acquired by the trust. However, this process required examination of corporate records over many years and often raised difficult questions concerning valuation and accounting procedures.[588] The complexities of the rule, the unpredictability of outcome, and the increasing sophistication of corporate issues have resulted in the diminished use of the rule.[589]

A further approach was the so-called Kentucky rule, adopted toward the end of the nineteenth century. This rule was a court-made rule based upon the source of corporate funds.[590] It stated that, if a corporation declared any dividend out of profits, whatever be the nature of the declaration, this was income. Equally, if a dividend was based upon revenue received from the sale of corporate assets, this was capital. Although, in contrast to the Pennsylvania rule, this rule was relatively simple to apply, it nonetheless often resulted in arbitrary allocations. As a result, Kentucky statutorily abandoned the rule in 1954.[591]

Contemporaneously with the pronouncements of the Pennsylvania and Kentucky rules, Massachusetts, in 1868, enunciated the so-called Massachusetts rule,[592] which was eventually to become the rule adopted by the majority of jurisdictions in the United States. The rule, not unlike the "form" test espoused by Commonwealth jurisdictions, directed that cash dividends on corporate stocks were to be viewed as income, while stock dividends, that is profits distributed in the form of further capital entitlement, were to be considered capital. In 1931, in response to the wide variety of allocation rules that existed among the states, the National Conference of Commissioners on

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[588] The method of apportionment was predicated on the theory of "intact value"; that is, it was based on the concept that the capital of the trust owns an interest in all the corporation's accounts equal to the proportionate share interest originally acquired by the trust, known as the "intact value" of the trust. Any distribution of earnings was, in the first instance, presumed to be income, but if the intact value of the original shares would be impaired by such an allocation, an apportionment was made to capital in order to preserve the intact value. Valuation of the corporation's accounts posed a significant problem. At first market value was taken, but, as that proved unsatisfactory, book value was adopted. This demanded a resort to corporate balance sheets, and in turn to a list of arbitrary asset values. Hawaii and New Jersey also attempted other accounting devices to meet the problems of the arbitrary elements. For a full account, see Flickinger, "A Trustee's Nightmare: Allocation of Stock Dividends between Income and Principal" (1963), 43 B.U. L. Rev. 199. See, also, Robinson, "Trust Allocation Doctrine and Corporate Stock: The Law Must Respond to Economics" (1972), 50 Tex. L. Rev. 747.

[589] See Scott, *supra*, note 140, § 236.3, at 1975-88.

[590] *Hite's Devisees v. Hite's Executors*, 93 Ky. 257, 20 S.W. 778 (Ky. Ct. App. 1892).

[591] Ky. Rev. Stat., § 386.020(4).

[592] *Minot v. Paine*, 99 Mass. 101 (1868).

Uniform State Laws adopted the Massachusetts rule for the allocation of corporate distributions. The rule, which first appeared in the Uniform Principal and Income Act of 1931, was retained in substance in the 1962 revision of that Act, which is now in force in thirty-six jurisdictions of the United States.[593] The central aim of the Commissioners in adopting the Massachusetts "form" test was to make administration simple and convenient for trustees. Therefore, they sought workable rules that they considered to be in line with the usual wishes of settlors and testators, and that they regarded as considerate to all beneficiaries, present and future.[594]

A concept that the National Conference of Commissioners on Uniform State Laws rejected in 1962, when the Uniform Principal and Income Act was revised, was the so-called "six percent" rule. This rule is applied in

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[593] See *supra*, notes 481 and 506. While the 1962 revision of the American Uniform Principal and Income Act retains the principle of the Massachusetts rule, it has also provided specifically for problems that have arisen since the original Act was adopted, such as the treatment of distributions of a regulated investment company or real estate investment trust. Section 6 of the Uniform Principal and Income Act, 1962, provides as follows:

> 6. [Corporate Distributions]
>
> (a) Corporate distributions of shares of the distributing corporation, including distributions in the form of a stock split or stock dividend, are principal. A right to subscribe to shares or other securities issued by the distributing corporation accruing to stockholders on account of their stock ownership and the proceeds of any sale of the right are principal.
>
> (b) Except to the extent that the corporation indicates that some part of a corporate distribution is a settlement of preferred or guaranteed dividends accrued since the trustee became a stockholder or is in lieu of an ordinary cash dividend, a corporate distribution is principal if the distribution is pursuant to
>
> (1) a call of shares;
>
> (2) a merger, consolidation, reorganization, or other plan by which assets of the corporation are required by another corporation; or
>
> (3) a total or partial liquidation of the corporation, including any distribution which the corporation indicates is a distribution in total or partial liquidation or any distribution of assets, other than cash, pursuant to a court decree or final administrative order by a government agency ordering distribution of the particular assets.
>
> (c) Distributions made from ordinary income by a regulated investment company or by a trust qualifying and electing to be taxed under federal law as a real estate investment trust are income. All other distributions made by the company or trust, including distributions from capital gains, depreciation, or depletion, whether in the form of cash or an option to take new stock or cash or an option to purchase additional shares, are principal.
>
> (d) Except as provided in subsections (a), (b), and (c), all corporate distributions are income, including cash dividends, distributions of or rights to subscribe to shares or securities or obligations of corporations other than the distributing corporation, and the proceeds of the rights or property distributions. Except as provided in subsections (b) and (c), if the distributing corporation gives a stockholder an option to receive a distribution either in cash or in its own shares, the distribution chosen is income.
>
> (e) The trustee may rely upon any statement of the distributing corporation as to any fact relevant under any provision of this Act concerning the source or character of dividends or distributions of corporate assets.

[594] American Uniform Principal and Income Act, *supra*, note 481, at 430-31.

Pennsylvania,[595] New York,[596] and New Jersey[597] to remove some of the unfairness that can result from the application of the Massachusetts or "form" rule to the classification of corporate distributions. Under this rule all dividends, whether in stock or in cash, ordinary or extraordinary, are allocated to the income account if they constitute six percent or less of the value of the corporation's outstanding shares before the distribution is made. The rule is based on the assumption, which was demonstrated to be correct in a study conducted in 1965,[598] that small distributions of six percent or less have their origin in earned, rather than in unearned, surplus.

Before concluding our review of American jurisdictions, we would note two other approaches to the allocation of corporate distributions, one, the "prudent man" rule, in force, at present, in Delaware, and the other, the "unitrust" or "percentage trust" proposed by American judicial literature. Regarding the first approach, Delaware, not having adopted either the original Uniform Act of 1931 or the revised 1962 Act, continued to adhere to the Kentucky rule until 1962. At that time Delaware abandoned its judicial version of the Kentucky rule, and became the only state then, or since, to adopt statutorily what has become known as the "prudent man" rule. Under this rule, trustees are required to assess, as would a prudent man, whether the distribution in question should be regarded as income from an investment, or whether it should be viewed as a diminution of an income-producing property.[599] In making this assessment, trustees must ask whether the distribution is likely to reduce substantially the future earning capacity of the corporation. Trustees must also consider whether the distribution is likely to reduce materially the future income of the shares held by the trust. Further, trustees must take into account any other relevant and significant factors.[600] Accordingly, in classifying corporate distributions, the rule requires trustees to do more than merely assess the source of each receipt.

The final approach that we wish to note is the "unitrust" or "percentage trust",[601] a concept first suggested by American judicial writing.[602] Under the percentage trust, trustees invest and manage a single fund and keep a single set of accounts for that fund, rather than maintain separate "income" and "capital" accounts. All receipts of whatever nature are paid into the fund, and all disbursements of whatever nature are paid out of the fund. Periodically the fund is valued, although not necessarily on an annual basis. The income beneficiary receives a prescribed percentage annually of the periodic valuations, and this payment is treated by trustees in the same way as any other proper disbursement from the fund. The prescribed percentage payable to the life beneficiary may be fixed at a certain figure, which by an appropriate process is periodically reviewed in order to ensure that it is in accord with a current fair economic return. Alternatively, it may be determined by the current return on a familiar type of trust investment.[603] The capital beneficiary, or remainderman, receives the balance of the fund at the close of the interest of the income beneficiary.[604] Depreciation of any assets of the trust will be reflected in the periodic valuations, and depletion will be ascertained in the same way. As the percentage return is calculated on the value of the trust's assets, it follows that the life tenant shares in the depreciation and depletion.

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[595] The Supreme Court of Pennsylvania first suggested the idea in *Catherwood Trust*, 405 Pa. 61, 173 A.2d 86 (1961), and it was adopted statutorily in 1963: see Pa. Stat. Ann., tit. 20, § 8105 (Purdon). See, also, Devine, "Principal and Income Allocation of Stock Distributions - The Six Per Cent Rule" (1966), 64 Mich. L. Rev. 856, and Scott, *supra*, note 140, § 236.7, at 1996-99.

[596] N.Y. Pers. Prop. Law, § 27-e (McKinney).

[597] N.J. Stat. Ann., § 3A: 14A-4 (West), as am. by N.J. Laws 1964, c. 123. In New Jersey, the relevant figure is four percent.

[598] The study was conducted by the Trust Department of the Chase Manhattan Bank, and involved 227 stock distributions. See Shapleigh, "How fair is the Six Percent Rule on stock distributions?" (1965), 104 Trusts & Es. 908.

[599] See further, Devine, *supra*, note 595, at 865-69.

[600] Del. Code Ann., Rev. 1974, § 3526(a).

[601] The American description is "unitrust". We have employed the term, "percentage trust", because of the possible confusion with the investment "unit trust". See, also, Gibson, "Trusts and Estates" (1971), Can. Tax Fdn. Conf. 354, at 363-64.

[602] The percentage trust, or unitrust, was first discussed, and its mode of operation examined, by Lovell, "The Unitrust: A new concept to meet an old problem" (1966), 105 Trusts & Es. 215. We have also considered for this purpose the Model Charitable

(ii) Conclusions

As we have mentioned, in Ontario, the "form" test governs the classification of corporate distributions. However, the manner in which a corporation handles its profits does not have regard to the obligations of trustees towards income and capital beneficiaries. For this reason the "form" test, directing that the characterization of distributions by a corporation is binding upon trustees, has been frequently criticized. In defence of the "form" test, it may be argued that this test is simple, clear in the result, and definitive; it is, therefore, convenient for trust administration, and, accordingly, saves money, time, and trouble. Nonetheless, it cannot be overlooked that the test is arbitrary. A testator or settlor presumably creates a successive interest trust because he wishes a steady income percentage paid to A, the income beneficiary, and the capital to be taken by B, the remainderman, on A's death. It follows that, if the decisions of a third party who has no connection with and no interest in the trust determine whether receipts accrue either to A or B, it is merely fortuitous if the expectations of the testator or settlor are fulfilled.

In considering the various alternatives for reform of the "form" test, we note that none of the Commonwealth jurisdictions has found any commendable judicial alternative to *Hill v. Permanent Trustee Co. of N.S.W. Ltd.*[605] Further, the trustee legislation of England, the Australian States, and New Zealand is silent on this matter.

Remainder Unitrust contained in the *Report of the A.B.A. Committee on Charitable Giving, Trusts and Foundations* (1975), 10 Real Prop. Prob. & Tr. J. 535. See, also, Comus, "The Unitrust in Estate Planning: A Partial Panacea" (1967-68), 21 Vand. L. Rev. 1023.

[603] In Ontario, we understand that the return on prime residential mortgages in Toronto has been adopted for this purpose.

[604] Translated into the language of income and capital, the life tenant will be entitled to his payment first out of income, and any deficiency out of capital. Excess income is accumulated, and is added to capital.

[605] *Supra*, note 581.

Turning to the statutory approach adopted by the majority of American jurisdictions, we have considered closely the provisions of the Uniform Principal and Income Act, but have concluded that their adoption in Ontario is not desirable. Our main reason is that, as the basis for the Uniform Act's provisions on the classification of corporate distributions is the "form" test, they vary only slightly from the common law rules followed in Ontario. Consequently, adoption of these provisions would not be justifiable or achieve anything.

We have also weighed the advantages and disadvantages of the "six percent" rule. In favour of this rule it may be asserted, first, that a more regular pattern of allocations to the trust's income account can usually be obtained, and, secondly, that trustees are able, without lowering the income beneficiary's expectations, to invest in those corporations that reinvest an abnormally high percentage of their earnings, but pay stock dividends. This rule, to some degree, separates the investment task of trustees from their task *vis-à-vis* the beneficiaries of allocating receipts. The rule permits trustees to invest so as to produce the greatest gain commensurate with the security of the capital invested, while going some way to prevent an attack from an income beneficiary that they have favoured the capital beneficiary. Moreover, it obviates the necessity for trustees to distinguish between the various kinds of dividend declaration, namely, ordinary, extraordinary, stock, and stock split.

Nevertheless, on balance, the Commission has no hesitation in rejecting the "six percent" rule. Although perhaps fairer than its counterpart, the Massachusetts or "form" rule, the "six percent" rule does suffer shortcomings. From a definitional point of view, if "income" means profits that are realized, then, strictly speaking, a stock dividend of six percent or less cannot be such a distribution, because the profit is not realized until the stock is sold. A sale of the same proportionate share of the corporation's holdings would, presumably, realize the same money receipt, and, if such a sale took place, the proceeds, not being by way of dividend, would go, even under the "six percent" rule, to the trust's capital account exclusively. Accordingly, the rule, in deeming a stock dividend of six percent or less to be income, is to some degree arbitrary. Of a more substantive nature, it is argued that the "six percent" rule presents administrative difficulties, particularly as the volume of small distributions increases with a growing number of corporations attempting to make low-yield stock more attractive.

The major objection to the "six percent" rule, however, is that it assumes that a corporation, although pursuing a heavy reinvestment policy, will at least issue dividends, whether cash or stock. Clearly, if a corporation issues no dividends, or dividends that do not constitute a fair yield, there is nothing that the "six percent" rule can do to alleviate the situation. The value of such an investment will be reflected, so far as the trust is concerned, in its sale value that must go to capital. Finally, while the allocation of a fixed six percent of corporate distributions to the income account may have been a suitable return during periods of low inflation, a greater flexibility is required by trustees to meet today's volatile market conditions.

Having expressed our reasons for not adopting, as an alternative to the "form" test, either the provisions of the American Uniform Principal and Income Act or the "six percent" rule, we now wish to discuss two approaches that we consider could usefully be included in the revised Act. These two approaches are the discretionary allocation trust and the percentage trust.

a. Discretionary Allocation Trust

The discretionary allocation trust embraces, in general, an approach that we understand is not unfamiliar to current Canadian practice. As we have stated, in Ontario trust instruments often authorize trustees to allocate receipts, including corporate receipts, between income and capital beneficiaries at the trustee's discretion, subject, of course, to the duties of care and of impartiality.[606] So far as we are aware, this approach, which we call the "prudent man" approach, has not been statutorily adopted in any Commonwealth jurisdiction. Further, it is considerably broader in scope than the Delaware rule, which, although based upon the element of prudence, restricts its exercise to allocation decisions concerning the character of individual receipts.

The prudent man approach, unlike the other rules we have previously reviewed, enables the trust portfolio to be treated as a whole; it is not concerned with the character of each particular trust receipt. It permits trustees the flexibility and discretion to manage a portfolio so as to achieve growth value, while at the same time to balance the treatment of the income and capital beneficiaries. In this sense, the prudent man rule is unique in that it minimizes the impact of even hand considerations upon investment decisions for trustees.

Nonetheless, this approach requires that trustees possess a significant degree of financial analytical skills, or at least the ability to understand the recommendations that financial advisers render. It may also be said that the prudent man rule exposes trustees to attack by beneficiaries who may allege that the trustees' conduct, in the circumstances, was not prudent. An attack of this nature would require the court to determine the issue of prudence, an issue that may be both difficult to assess and to predict. Moreover, where small amounts of money are involved, the time and expense involved with prudent man considerations may be said to be unjustified. And, of course, it may generally be alleged that this approach, where decisions turn upon the conduct of the prudent man,[607] does not permit uniform objective standards to develop. Indeed, it may be argued that, so far as common stock investment is concerned, the prudent man rule places beneficiaries in the position where they no longer possess definitive interests of the classic income and capital kind.

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[606] This power is not inconsistent with *Re Bronson*, [1958] O.R. 367, 14 D.L.R. (2d) 51 (H.C.J.). In that case, it was established that, as a matter of public policy, a settlor or testator may not validly confer a power upon trustees to determine whether any particular receipt is income or is capital. The power discussed does not relate to this issue. Rather, it authorizes trustees to distribute receipts among income and capital beneficiaries, regardless of whether the receipts be classified as income or as capital.

[607] The problems involved in allocation between the income and capital accounts is well illustrated in *Maryland National Bank v. Merson*, 239 A.2d 905 (Md. Ct. App. 1968), discussed in Hoak, "Range of Returns: A New Approach to the Allocation of Trust Gains and Losses" (1969), 21 Stan. L. Rev. 420.

We have sought to express the major objections to the prudent man rule because we have concluded that, on balance, this approach comes closest to achieving equity among the trust beneficiaries and to facilitating the adoption of sound investment practices. The prudent man rule also allows trustees to take into account tax considerations. It is, no doubt, for these reasons that a clause conferring upon trustees a discretion to allocate receipts among beneficiaries is often found in well-drawn trust instruments. We are of the opinion that the revised Act should contain a facultative provision, which a settlor or testator would be free to adopt or ignore, permitting the discretionary allocation of receipts between income and capital. In this regard, trustees would be governed, of course, by the duty to maintain an even hand among successive beneficiaries.[608] However, two matters remain for comment.

First, we do not consider that the prudent man rule should be mandatory for testators or settlors. Considerable experience has been acquired by the legal profession in handling the case law "form" test. Further, accepted practices concerning the classification of corporate distributions have been established, and there may be many settlors and testators who will prefer the certainty produced by the "form" test, or who may regard the "form" test as more compatible with the nature and size of the particular trust contemplated, or with the knowledge and experience of those whom they wish to act as trustees. For these reasons, we are of the view that the discretionary allocation power should only apply where the creator of the trust so provides in the trust instrument by the use of the words "on discretionary allocation trust".

Secondly, it will be recalled that, to this stage, our discussion has been limited to the classification of corporate distributions. However, we are of the view that the discretionary power should apply to all types of receipt and, further, should be equally applicable to the allocation of disbursements between income and capital. We have earlier recommended that trustees should be able, in their discretion, to pay and allocate outgoings between income and capital beneficiaries.[609] It may, therefore, be contended that it is unnecessary and duplicative to extend the discretionary allocation power to outgoings. However, our intention is that the proposed discretionary allocation power should be self-contained, so that a creator of a trust who expressly invokes its application would thereby confer upon his trustees discretion to allocate both receipts and outgoings. In addition, we are of the view that the provisions recommended earlier in the context of the apportionment of outgoings concerning deductions for depreciation and obsolesence and the actual payment and recoupment of outgoings from either capital or income, as the case may be, are equally applicable where a trust instrument authorizes assets to be held on a discretionary allocation trust.[610]

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[608] See *supra*, this ch., sec. 4(c)(ii)c, and Draft Bill, s. 39.

[609] See *supra*, this ch., sec. 4(b)(iv).

[610] See *supra*, this ch., sec. 4(b)(iv), and Draft Bill, s. 40(2) and (3).

Accordingly, we recommend that the revised Act should contain a provision to the effect that, where trustees are expressly directed by the trust instrument to hold trust assets "on discretionary allocation trusts", they shall allocate receipts to, and charges for outgoings against, the income and capital accounts as they consider just and equitable in all the circumstances. In so doing, it should be their duty to maintain an even hand as between income and capital beneficiaries.[611] Moreover, where trustees are expressly directed by the trust instrument to hold trust assets on discretionary allocation trusts, the recommendations proposed previously concerning deductions for depreciation and obsolescence and for the payment and recoupment of outgoings in whole or in part from either income or capital should apply.[612]

We are also of the view that it would be useful to provide trustees with guidance regarding the allocation of receipts as income or as capital. Such guidance, while not intended to derogate from the general discretionary allocation power, would assist trustees with initial determinations concerning which receipts should be treated as income and which as capital. Accordingly, we recommend that the revised Act should specify that, for the purpose of determining the relative proportionate interests of beneficiaries of the trust, income should generally be understood to be the return in money or property derived from the use of capital; and capital should generally be understood to be the property set aside to be delivered eventually to a remainderman, while the return or use of the capital is, in the meantime, taken or received by or held for accumulation for an income beneficiary.[613]

Finally, we wish to note two diverse points regarding the operation of these proposed provisions. First, we are aware that, if a trustee, pursuant to a discretionary allocation trust provision conferred by the trust instrument, allocates income receipts to the capital account, accumulation of these receipts in the capital account may run the risk of offending the maximum accumulation periods specified in the Ontario *Accumulations Act*.[614] This might deter trustees from making such an allocation decision, even though it would be in the best interest of the trust to do so. Accordingly, in order to remove this impediment, we recommend that the *Accumulations Act* should not apply to the operation of the proposed statutory discretionary allocation trust provisions.[615] Secondly, although the discretionary allocation trust provisions might be viewed as blurring the distinction between the income and capital accounts, we are of the view that the employment of these provisions should not preclude a testator or settlor from conferring upon the trustees a power to encroach upon capital in favour of an income beneficiary, and we so recommend.[616]

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[611] Draft Bill, s. 41(1).

[612] *Ibid.*, s. 41(2).

[613] *Ibid.*, s. 41(3).

[614] *Supra*, note 460.

[615] Draft Bill, s. 43(1).

[616] *Ibid.*, s. 43(2).

b. Percentage Trust

One aim of our recommendations to this juncture has been to minimize the impact of even hand considerations upon the investment decisions of trustees. To this end, we have recommended that the creator of a trust should be able to provide that his trustees are to hold trust assets "on discretionary allocation trusts", a mechanism that would enable trustees to allocate receipts and outgoings to the income and capital accounts as they in their sole discretion think fit. In this manner, trustees would be able to assess the suitability of investments based upon all relevant circumstances, confident in the knowledge that, although a particular investment might not treat income and capital equitably, this could be remedied by the discretionary power to adjust the income and capital accounts.

Although we are of the view that our recommendations in this area go a great distance to promote sound investment decisions and equitable allocation of receipts and outgoings, they envisage that the property interests of successive beneficiaries will continue to be classified as income and capital. While trustees under a discretionary allocation trust are not required to consider whether a particular receipt is income or capital, they still must allocate receipts to the income and capital accounts in a manner that will maintain an even hand between the successive beneficiaries. In other words, we appreciate that the conferment upon trustees of a broad discretion does not remove the problem of allocation of receipts and outgoings between income and capital beneficiaries; rather, it shifts the problem to be dealt with at the accounting level.

We have considered, therefore, whether investment considerations could be severed completely from the allocation decisions of trustees. We have also considered whether there could be a departure from the commonly understood notion of "income" and "capital" accounts. We are of the view that the percentage trust concept would achieve these objectives.

Various arguments have been made in favour of the percentage trust. It has been asserted that trustees can invest for gain, albeit prudently, and have no regard to whether receipts should be allocated to, or outgoings should be paid from, the income or capital account: that is, trustees have the freedom to invest both in low yield equities and high yield debt securities without producing rises and falls in the life tenant's income. The percentage trust also enables the income beneficiary to share in the inflationary growth of capital assets. Moreover, the percentage trust promotes better investment performance of the trust funds, while at the same time maintaining the life tenant's income over a period of years at a constant level. In particular, so far as corporate distributions are concerned, it has been contended that investment decisions may be taken with a view solely to the factors that constitute or affect gain. The only restraint upon the trustee under a percentage trust is that he must pursue the prudent investment policies required of fiduciaries.

However, there are limitations to the percentage trust. Because of the need of trustees to draw on capital in those years when the actual return on the trust investments is below the percentage that is to be paid to the income beneficiary, the assets of the percentage trust should be readily marketable.

Mortgages, income-producing real estate, and business interests are, therefore, best handled in the conventional manner of income and capital accounting. The problem is not insoluble for the average trustee, who is likely to have a mix of assets in the portfolio, but there could be a liquidity problem. In the main, a percentage trust is only worthwhile if the trust holds common stock that has a growth potential. There could also be problems for percentage trust accounting when the trust is yielding an invisible return: for example, where, in the case of a testamentary trust, the life tenant is living in a house owned by the trust. It is possible, of course, to charge the tenant an economic rent, but this is not likely to have been the testator's wish, and, if the house is removed as a source of receipts, the outgoings will still appear on the disbursements side.[617]

Moreover, the valuation of the trust assets can be costly and, when shares in a closely held corporation are involved, difficult. It is possible to have valuations made less frequently than annually, but we understand from those with experience that valuations should not be less frequent than every three years. When the share market is going through times of erratic movement, as has been the case during the recent past, the timing of valuations, where common stock is concerned, can be crucial. A valuation in share values at a temporary high point, or low point, could produce an unrealistic economic return for the income beneficiary throughout the period when that valuation determines the amount that is to be paid to the beneficiary. And there is another difficulty with valuation. If it reflects inflation, the revenue received by the income beneficiary will be based upon paper gains. Interest rates themselves reflect the inflation factor, and these rates will normally have much to do with the prescribed percentage that is fixed. It is possible to contend, therefore, that the percentage trust markedly favours the income beneficiary as the inflation factor increases.

The central difficulty for the percentage trust, however, stems from the definition of "income" in the *Income Tax Act* (Canada).[618] This Act defines income not only to mean income as understood in the law of trusts, but also to include taxable capital gains. It follows, therefore, that the position of the income beneficiary under the percentage trust and under the federal Act will only coincide in this context when the percentage payable in any year is the same in amount as the actual income, plus the taxable capital gain. The preferred beneficiary election[619] would still be useful, but often difficult to apply. Moreover, capital dispositions may be required, which may trigger capital gains, in a year when the trustees have to draw on capital to pay the income beneficiary's percentage. Further, because of the federal Act's definition of income, a spousal trust will be tainted if the actual income of the percentage trust is greater in any year than the percentage to which the income spouse beneficiary is entitled.

Although we understand that the percentage trust is employed by some practitioners in the Province, we were initially of the view that there was little, if anything, that could be gained by including a provision of this nature in the revised Act. Indeed, we were concerned that draftsmen might be encouraged to employ this mode of trust accounting without, perhaps, fully realizing the difficulties for trustees that can subsequently arise. However, as we have previously stated, it is the lack of separation of investment policy from the allocation of receipts and outgoings that, in our view, can create difficulties for trustees in the administration of a trust. The percentage trust, by ensuring that the income beneficiary receives a fair economic return on a periodic basis, with the remaining value of the trust assets being regarded as capital, effectively achieves this separation.

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[617] It is probably best to exclude such assets from the percentage trust, and continue to handle them in the conventional manner.

[618] *Supra*, note 281.

[619] See Cullity and Forbes, *Taxation and Estate Planning* (1978), at 113-15.

For this reason, we endorse the general concept of the percentage trust, but we also appreciate, having particularly in mind the tax implications, that not all settlors or testators may be attracted to its unique provisions. Accordingly, we have concluded that the revised Act should include a facultative provision, which a settlor or testator would be free to adopt or to ignore as he chooses. Such a provision would set out a comprehensive percentage trust, and it would enable draftsmen to adopt the statutory trust solely by expressly employing the words, "on percentage trusts", in the trust instrument.

We therefore recommend that the revised Act should contain a provision to the effect that, where trustees are expressly directed by the trust instrument to hold trust assets "on percentage trusts", they shall value the assets periodically and, instead of any income arising from the assets, pay to the person who would otherwise be the income beneficiary a percentage of that valuation in each year of the valuation period. In so doing, trustees should be required to maintain an even hand between income and capital beneficiaries.[620] The Act should further provide that, where there are two or more income beneficiaries whose interests are vested in possession at the same time, the percentage should be divided equally among them, unless the trust instrument divides the percentage in another proportion, or makes other provision, including discretionary trusts, for the distribution of the percentage.[621] In addition, we recommend that the percentage payment should be made from income arising during the accounting year and, so far as income is insufficient, from capital, and that any income of the trust arising during the accounting year in excess of the amount of the percentage payment should be added to capital.[622]

For clarity, we also recommend that the following words should be defined in the revised Act: first, "assets" should be defined to mean the capital of the trust property subject to the percentage trusts, plus the income arising therefrom on hand, accumulated and accrued on valuation day; secondly, "valuation" should be defined to mean the fair market value of the assets less the liabilities outstanding at the moment of valuation; and finally, "valuation period" should be defined to mean the period of time between one valuation and the next.[623]

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[620] Draft Bill, s. 42(1).

[621] *Ibid.*, s. 42(2).

[622] *Ibid.*, s. 42(3).

[623] *Ibid.*, s. 42(4).

We are also of the view that the frequency of valuations for the statutory percentage trust, and the percentage to be paid annually during any valuation period, should be established and kept under review by a governmental review agency. Decisions of this agency should be binding upon the trustees, unless the creator of the trust has provided to the contrary. Accordingly, we recommend that where the trust instrument does not provide for the frequency of valuations or for the percentage that is to be paid annually during a valuation period, the Lieutenant Governor in Council should be empowered to make regulations providing therefor and for such ancillary matters as he considers proper.[624]

Lastly, as with the operation of the discretionary allocation trust provision, in order to prevent accumulations of income receipts in the proposed single fund of the percentage trust from violating the maximum accumulation periods of the Ontario *Accumulations Act*,[625] we recommend that this Act should not apply to the operation of the proposed statutory percentage trust provision.[626] Furthermore, as the percentage trust concept, even more so than the discretionary allocation trust, eliminates the distinction between an income and capital account, this should not preclude a testator or settlor from conferring upon the trustees a power to encroach upon capital in favour of a beneficiary. We so recommend.[627]

RECOMMENDATIONS

The Commission makes the following recommendations:

1. Sections 26 and 27 of the Ontario *Trustee Act* should be repealed, and in their place the revised Act should adopt a version of the prudent man rule for trustee investment powers. Accordingly, the revised *Trustee Act* should provide that the basic duty of care proposed for inclusion in the revised Act – namely, that in the discharge of their duties and the exercise of their powers, whether the duty or power is created by law or the trust instrument, trustees shall exercise that degree of care, diligence, and skill that a person of ordinary prudence would exercise in dealing with the property of another person – should govern the power of investment.

2. Subject to the basic duty of care and the terms of the trust instrument, trustees should be able to invest trust money in any kind of property.

3. The revised Act should provide that, in investing trust money under the proposed statutory power of investment, among the matters that trustees may appropriately consider are the following:

   (a) the marketability of the investment;

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[624] *Ibid.*, s. 42(5).

[625] *Supra*, note 460.

[626] Draft Bill, s. 43(1).

[627] *Ibid.*, s. 43(2).

(b) the length of the term of the investment, including its maturity date, callability and redeemability;

(c) the probable duration of the trust;

(d) the probable condition of the market with respect to the value of the investment at the termination of the trust, especially if at the termination of the trust the investment must be converted into money for the purpose of distribution;

(e) the probable condition of the market with respect to reinvestment at the time when the investment matures;

(f) the aggregate value of the trust estate and the nature of the other investments;

(g) the effect of the investment in increasing and diminishing liability for taxes; and

(h) the likelihood of inflation.

4. The revised Act should stipulate expressly that trustees are not obliged to consider each of the matters mentioned above before deciding upon any investment.

5. The revised Act should contain a set of administrative powers that are customary in well-drawn contemporary trust instruments. Further, the testator or settlor should be able to exclude or modify any of the statutory administrative powers conferred upon trustees.

6. The current arbitrary placement of administrative powers in the Ontario *Trustee Act* should be replaced by a thematic list in the revised Act.

7. Where land is settled on trust for successive beneficiaries, the powers of management and administration should not be conferred upon the life tenant or other limited owner in possession. Rather, the revised Act should confer such powers directly upon the trustees, in order that they may exercise necessary administrative powers for all trust assets.

8. In order to implement the proposal contained in Recommendation 7, the Ontario *Settled Estates Act* should be amended so as to exclude from its operation settlements of land by way of trust. The *Settled Estates Act*, insofar as it confers administrative powers in relation to common law settlements of land, should remain in force, pending a review of the basic principles of land law.

9. The revised *Trustee Act* should provide expressly that the exercise of the listed statutory administrative powers set out in Recommendations 10, 11, and 14 to 29 is subject to the basic duty of care proposed for inclusion in the revised Act.

10. The revised Act should provide that trustees may, pending investment, or for the purpose of paying the ongoing expenses of the trust, deposit trust money in a chartered bank, trust company, or any other depository empowered by law to accept moneys for deposit.

11. The revised Act should provide that trustees may sell trust property by public auction or private contract for cash or credit on appropriate security.

12. The revised *Trustee Act* should provide that, where land is held by trustees for a charitable purpose and it appears that the land can no longer be advantageously used for such charitable purpose or that for any other reason the land ought to be sold, the court may authorize its sale and give such directions in relation to the sale and for securing the due investment and application of the money arising from the sale as are appropriate.

13. The revised *Trustee Act* should provide that no order shall be made by the court under Recommendation 12 unless notice has been given to the Public Trustee.

14. The revised Act should contain a provision to the effect that trustees may dispose of trust property by way of exchange for other property, or where the trust property consists of an undivided share, concur in the partition of the property in which the share is held.

15. The revised *Trustee Act* should provide that trustees may, as lessees, renew a lease held by the trust.

16. The revised Act should contain a provision to the effect that trustees may, as lessors, grant or renew a lease or sublease of trust property for a term not exceeding, in the case of residential property, three years, or, in the case of any other type of property, seven years, or, with the consent of the court, grant or renew a lease or sublease of trust property for longer periods or grant an option to renew the lease or sublease or to purchase the reversion.

17. The revised Act should provide that trustees may manage, maintain, repair, renovate, improve, or develop trust property, including in the case of land subdividing, erecting buildings, dedicating for any public purpose, granting easements, *profits à pendre*, or licences, and entering into agreements with respect to boundaries, party walls, fencing, or other matters in connection with trust property.

18. The revised Act should provide that trustees may insure against loss or damage to trust property and against any other risk of liability.

19. The revised Act should contain a provision to the effect that trustees may carry on any business, whether as sole proprietor, partner, limited partner, or otherwise, and may incorporate or otherwise change the form of the business, and dispose of or wind up the business.

20. The revised Act should contain a provision to the effect that trustees may exercise all rights and powers and satisfy all liabilities incidental to the ownership of shares or obligations of a corporation, including power to sell or exercise subscription rights, to exchange the shares or obligations for other shares or obligations, to join in plans for reconstruction, reorganization or amalgamation, to enter into pooling or other agreements, and to authorize the sale of the assets or undertaking of the corporation.

21. The revised Act should provide that trustees may surrender insurance policies, leases, or other property subject to onerous obligations of such a nature that it would not be in the interests of the beneficiaries to retain the trust property.

22. The revised Act should provide that trustees may purchase or rent living accommodation or construct a house on land held by them for the purpose of providing a home for the person entitled to the income of the money expended in respect of the purchase, or to the income to be expended in respect of the rent, or to the income of either the land or the money expended in respect of the purchase or construction, if the person for whom the living accommodation is provided consents thereto.

23. The revised Act should contain a provision to the effect that trustees may borrow money and, as security, mortgage, pledge, or otherwise charge any of the trust property.

24. The revised Act should provide that trustees may pay or assert or contest any claim, and compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim or thing relating to the trust or the trust property.

25. The revised Act should provide that trustees may give a receipt in writing for any money or other property received. A receipt in writing for any money or other property received by trustees should be a sufficient discharge to the person paying or transferring the money or other property and should exonerate him from seeing to its application or being answerable for its misapplication.

26. The revised Act should contain a provision to the effect that trustees may pay out of trust money any taxes, assessments, charges, premiums, or other outgoings in respect of trust property.

27. The revised Act should contain a provision to the effect that trustees may reimburse themselves or pay or discharge out of trust property all expenses incurred in or about the administration of the trust.

28. The revised Act should provide that trustees may appropriate property *in specie* in or towards satisfaction of the share or interest of any beneficiary, with the consent of that beneficiary. For the purpose of the appropriation, following consultation with a qualified person where the trustees are not personally qualified, trustees should place a valuation on the property. However, no specific gift made by the trust instrument should be adversely affected by an appropriation of property *in specie*. In addition,

within one month of the valuation or such further time as the court authorizes, the trustees, beneficiaries or any other interested person should be able to apply to the court for a review of the appropriation or the valuation, and, following such notice as the court may order, the court should confirm or make such variation as it considers proper.

29. The revised Act should provide that trustees may do all supplementary or ancillary acts or things and may execute all instruments necessary or desirable to enable them to carry out effectively the intent and purpose of the powers vested in them.

30. The revised Act should contain a provision to the effect that, where in the administration of trust property any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction is in the opinion of the court expedient, but it cannot be effected because of the absence of a power for that purpose vested in the trustees by the trust instrument or by law, the court may, by order, confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose on such terms and subject to such provisions and conditions as the court thinks fit. The revised Act should further provide that the court may rescind, vary, or replace any such order, but that such a rescission, variation, or replacement does not affect any act or thing done in reliance upon the order before the person doing the act or thing became aware of the application to the court to rescind, vary, or replace the order.

31. Section 23(1) of the present *Trustee Act* should be carried over to the revised *Trustee Act*, pending a review of passing of accounts in the Commission's Project on the Administration of Estates of Deceased Persons. Accordingly, the revised Act should provide that trustees desiring to pass the accounts of their dealings with the trust property may file their accounts in the office of any court having jurisdiction, and that the proceedings and practice upon the passing of such accounts shall be the same and have the like effect as the passing of the accounts of executors or administrators, except that, in the case of trustees under a will, the accounts shall be filed and passed in the office of the court by which probate of the will was granted.

32. Rule 59 of the Surrogate Court Rules should be amended and incorporated in the revised *Trustee Act* to provide that trustees, whether of an *inter vivos* or testamentary trust, may pass their accounts voluntarily or may be called upon by citation to do so on the application of any person interested therein.

33. Sections 61(1) and (3) and 23(2) of the present *Trustee Act* should be consolidated in the revised *Trustee Act*. Accordingly, the revised Act should provide that trustees are entitled to such fair and reasonable compensation for their work and time spent on the trust as a court of competent jurisdiction on application or on the passing of accounts may award. This provision should be subject to the expression of a contrary intention concerning compensation contained in the trust instrument.

34. Section 61(4) of the present *Trustee Act* should be retained, but expanded in the revised Act to provide that trustees who possess or who because of their profession, business or calling have professional skills and who have rendered necessary professional services to the trust, apart from their duties and powers as trustees, are entitled to such additional compensation for such services as a court of competent jurisdiction may award.

35. In the absence of a contrary intent contained in the trust instrument, and subject to several specific controls that we shall propose in Recommendations 36 to 40, the revised *Trustee Act* should provide that trustees may, from time to time during the administration of the trust, pay to themselves or any of them from the assets of the trust such sum as in their opinion is fair and reasonable compensation for their work and time spent on the trust during the period of time to which the payment relates.

36. The revised *Trustee Act* should provide that, where trustees take interim compensation, they must, at the time of the taking, give notice to the beneficiaries of the sum taken under Recommendation 35 and an account of the services rendered.

37. Where the trustees have taken interim compensation, and they have not been compelled to pass the accounts of the trust, they should be required, on an application or when the accounts are eventually passed, to satisfy the court that the sum taken under Recommendation 35 was fair and reasonable.

38. The revised *Trustee Act* should provide that the Lieutenant Governor in Council may make regulations prescribing guidelines respecting the sums payable as interim compensation to trustees, as well as other matters concerning the taking of interim compensation under Recommendation 35.

39. The revised *Trustee Act* should provide that, where the court determines that the interim compensation was not fair and reasonable, it shall determine what is fair and reasonable, and shall order the difference between the sum taken and the sum fixed by the court returned with interest to the trust.

40. The revised *Trustee Act* should provide that, where a court determines that the sum taken as interim compensation was fraudulently taken, the court shall order it to be returned to the trust, and may deny any compensation to the trustees.

41. The revised Act should contain a provision to the effect that trustees may apportion any payment or expenditure for any outgoing between the income and capital accounts, or may charge the payment or expenditure exclusively to either income or capital, as they consider just and equitable in all the circumstances.

42. Regarding the scope of the term "outgoing", the revised Act should define this term to mean payments and expenditures, whether discharged by the

trustees or a beneficiary, resulting from and necessitated by the existence of the trust property, including expenses of administration, repairs, maintenance, insurance, taxes, payments on account of mortgages and debts, calls on shares, annuities, and business and other losses.

43. If Recommendations 41 and 42 are accepted, that portion of section 21 of the Ontario *Trustee Act* dealing with the payment of insurance premiums out of income should not be carried over to the revised Act.

44. The revised Act should contain a provision to the effect that trustees may pay for any outgoings from income or capital, or wholly or partly from each, as appears to them to be in accord with sound business practice and in the best interests of the trust beneficiaries as a whole.

45. The revised Act should contain a recouping provision whereby trustees may recoup capital from income, where the whole or part of the payment or expenditure has been made out of or charged to capital, or recoup income from capital, where the whole or part of the payment has been made out of or charged to income, if, in either case, trustees consider that course of action to be just and equitable in all the circumstances.

46. The revised Act should provide that trustees may, and if ordered by the court shall, deduct from the income derived from trust property that is subject to depreciation or obsolescence such amounts as are fair and reasonable having regard to sound business practice in order to protect the capital of the trust from loss, and that any sums so deducted should be set aside and added to the capital of the trust so as to become capital for all purposes.

47. Recommendations 41, 42, and 44 to 46 should not apply where a trust constitutes a trust for the exclusive benefit of the spouse of the testator or settlor within the meaning of the *Income Tax Act* (Canada), unless the trust instrument expressly provides that the provisions contemplated or a specified part thereof should apply.

48. Because the proposals contained in Recommendations 41 to 46 effect a significant change in relation to the allocation of outgoings, they should only apply to trusts that take effect after the revised Act comes into force. Moreover, the revised Act should state expressly that they are subject to the duty to maintain an even hand between income and capital beneficiaries (see *infra*, Recommendation 52).

49. The revised Act should provide that, where the court confers upon trustees an additional administrative power, the court should be able to direct in what manner any money authorized to be expended and the costs of any transaction are to be paid or borne as between capital and income.

50. With respect to the apportionment of receipts upon a change in ownership of or entitlement to trust assets, the Ontario *Apportionment Act* should continue in force, without modification. Further, income receipts not apportionable under that Act should continue to be allocated by the common law rules that are well established in Ontario.

51. With respect to the allocation of income pending conversion of trust assets, there should be no change in the law relating to rules associated with the second branch of the rule in *Howe v. Lord Dartmouth*, that is, the law with respect to the mode of apportionment, including, in those circumstances where the issue arises, the time of notional conversion of assets, and the allocation of a fair and reasonable income pending conversion of assets to the income beneficiaries.

52. The first branch of the rule in *Howe v. Lord Dartmouth*, dealing with the circumstances in which a duty to convert trust assets arises, should be stated in broader terms. Accordingly, the revised Act should provide that trustees must act impartially as between income and capital beneficiaries, having regard to each item of trust property, whatever the nature of the property, and whether it is an original asset or an asset that is acquired subsequently, further to an authorization in the trust instrument or conferred by statute.

53. The revised Act should provide that Recommendation 52 applies to all trusts unless the trust instrument expressly provides otherwise.

54. The revised Act should provide that, where any contract of insurance has been entered into and any premiums have been paid by the trustees, the money receivable by the trustees under the policy shall be held by them as capital money of the trust, subject to the terms of the trust, including the power of investment.

55. The revised Act should contain a provision to the effect that all or part of the money held by the trustees as capital money of the trust, and representing insurance proceeds, may be applied by the trustees, with the consent of the court, for rebuilding, reinstating, replacing or the major repair of trust property that has been lost or damaged.

56. The revised Act should provide that, where a beneficiary of a trust enters into a contract of insurance against loss of, or damage to, any trust property, or any other risk or liability to which the trustees are or might be exposed, whether or not the beneficiary is required by the trust instrument or by a third party so to do, the money received under the policy shall be held as capital money and assigned by the insured to the trustees.

57. The revised Act should provide that, in the event that money is received under a contract of insurance entered into by a beneficiary, the insured beneficiary shall be reimbursed by the trustees for the amount of such premium payment or payments as the trustees in their discretion consider reflects the interests of beneficiaries other than the insured in the trust property.

58. The revised Act should contain a provision to the effect that nothing in Recommendations 54 to 57 affects the rights of a mortgagee, lessor, lessee or other person in money so received from an insurer.

59. The revised Act should provide that Recommendations 54 to 58 apply only to money received by trustees after this Act comes into force.

60. The revised Act should contain a facultative discretionary allocation trust provision. Accordingly, the Act should provide that, where trustees are expressly directed by the trust instrument to hold trust assets "on discretionary allocation trusts", they shall allocate receipts to and charges for outgoings against the income and capital accounts as they consider just and equitable in all the circumstances. In so doing, it should be their duty to maintain an even hand as between income and capital beneficiaries.

61. Where trustees are expressly directed by the trust instrument to hold trust property on discretionary allocation trusts, Recommendations 44, 45, and 46 should apply.

62. In order to assist trustees in allocating receipts under Recommendation 60, the revised Act should specify that, for the purpose of determining the relative proportionate interests of beneficiaries of the trust, income should generally be understood to be the return in money or property derived from the use of capital; and capital should generally be understood to be the property set aside by the trust instrument to be delivered eventually to a remainderman, while the return or use of the capital is, in the meantime, taken or received by or held for accumulation for an income beneficiary.

63. The Ontario *Accumulations Act* should not apply to the operation of the proposed statutory discretionary allocation trust provision recommended above.

64. The employment of the proposed discretionary allocation trust provision should not preclude a testator or settlor from conferring upon the trustees a power to encroach upon capital in favour of an income beneficiary.

65. The revised Act should contain a facultative percentage trust provision. Accordingly, the Act should provide that, where trustees are expressly directed by the trust instrument to hold trust assets "on percentage trusts", they shall value the assets periodically and, instead of any income arising from the assets, pay to the person who would otherwise be the income beneficiary a percentage of that valuation in each year of the valuation period. In so doing, it should be their duty to maintain an even hand as between income and capital beneficiaries.

66. Where there are two or more income beneficiaries whose interests are vested in possession at the same time, the percentage should be divided equally among them, unless the trust instrument divides the percentage in another proportion, or makes other provision, including discretionary trusts, for the distribution of the percentage.

67. The percentage payment should be made from income arising during the accounting year and, so far as income is insufficient, from capital, and any income of the trust arising during the accounting year in excess of the amount of the percentage payment should be added to capital.

68. For clarity, the following words should be defined in the revised Act: first, "assets" should be defined to mean the capital of the trust property

subject to the percentage trusts, plus the income arising therefrom on hand, accumulated and accrued on valuation day; secondly, "valuation" should be defined to mean the fair market value of the assets less the liabilities outstanding at the moment of valuation; and finally, "valuation period" should be defined to mean the period of time between one valuation and the next.

69. Where the trust instrument does not provide for the frequency of valuations or for the percentage that is to be paid annually during a valuation period, the Lieutenant Governor in Council should be empowered to make regulations providing therefor and for such ancillary matters as he considers proper.

70. The Ontario *Accumulations Act* should not apply to the operation of the proposed statutory percentage trust provision.

71. The employment of the proposed statutory percentage trust provision should not preclude a testator or settlor from conferring upon the trustees a power to encroach upon capital in favour of a beneficiary.

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Volume

2

REPORT
ON THE
LAW OF TRUSTS

ONTARIO LAW REFORM COMMISSION

Ontario

VOLUME II

**Ministry of the
Attorney
General**

1984

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1984

The Ontario Law Reform Commission was established by section 1 of the *Ontario Law Reform Commission Act*. Section 2(1) of the Act states that it is the function of the Commission to inquire into and consider any matter relating to (a) reform of the law having regard to the statute law, the common law and judicial decisions; (b) the administration of justice; (c) judicial and quasi-judicial procedures under any Act; and (d) any subject referred to it by the Attorney General. The Commissioners are:

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CHAPTER 5

DISPOSITIVE POWERS OF TRUSTEES

1. INTRODUCTION

A dispositive power, or power of distribution, is an authority to a person, or group of persons,[1] to allocate trust property to a beneficiary or class of beneficiaries.[2] Generally speaking, this authorization may take one of two forms. The authorization may be in the form of a "pure" power, whereby the holder of the power has the authority to do a certain thing, but may decide whether he chooses to exercise the authority. On the other hand, the authorization may constitute a "trust" power, a concept also known as a power "in the nature of a trust". In this case, the trust imposes an obligation upon the recipient of the power to do a certain thing; if he fails to carry out the obligation, he will be liable for breach of trust. It is a matter of interpretation whether a settlor or testator has created a pure power or a power in the nature of a trust. However this may be, various kinds of dispositive powers or devices may be created, including the following: the power of appointment; the power of encroachment; the power of maintenance; the power of advancement; the discretionary trust; and the protective trust.

A power of appointment is the authority given to a person by the creator of a trust to choose who shall be the recipient of trust property. A number of variations of this power are possible and, although we do not need to examine them here, we would note that a settlor or testator may create either a special or a general power of appointment. A special power of appointment would exist where a widow, as income beneficiary of a testamentary trust, is given the power to determine how the capital of the trust shall be distributed on her death, with the distribution restricted by the creator of the trust to a specified class of beneficiaries, such as her children. On the other hand, a general power of appointment would authorize the widow to distribute the capital to any person or persons she chooses, including her estate.[3]

---

[1] As the material will indicate, while the authority is frequently conferred upon trustees, it may also be conferred upon persons who are not trustees, such as the life tenant.

[2] See, generally, Waters, *Law of Trusts in Canada* (1974), ch. 21; Mowbray (ed.), *Lewin on Trusts* (16th ed., 1964), at 292-313; and Hayton (ed.), *Underhill's Law relating to Trusts and Trustees* (13th ed., 1979), at 559-600.

[3] Moreover, the will might authorize the widow to allocate the capital to another by deed during her lifetime.

A power of encroachment is, in effect, a particular type of power of appointment, in that the creator of the trust confers upon a designated person the power to distribute capital to an income beneficiary. For example, a testator may leave his residuary estate on trust for his widow for life, remainder to the children of the marriage, and confer upon his trustees the power to distribute capital to the widow. Unless the will specifies the purposes for which such distributions are to be made, the trustees will have the authority, in their discretion, to determine whether there should be an encroachment on capital, and the purposes and extent of the payment. However, unlike special and general powers of appointment, which are essentially the ability to determine who shall be a beneficiary of the trust, a power of encroachment is more the ability to give added benefit to an existing beneficiary. It is largely for this reason that special and general powers of appointment are usually conferred upon persons other than the trustees, such as the life tenant, whereas it is the trustees who more often than not are authorized to exercise a power of encroachment.

Two other familiar dispositive powers that, if authorized by a trust instrument, are usually conferred upon trustees are the powers of maintenance and advancement, which are traditionally associated with trusts in favour of minors. If an interest is given to a minor, it will be held in trust for him until he comes of age, even if the interest is vested in possession and is indefeasible. In such circumstances, an express power of maintenance is usually given to trustees, so that, if the minor is in need prior to attaining majority, the trustees can pay or apply income, and in some cases capital, to meet his needs. The power of maintenance is commonly understood to refer essentially to the ability to apply income to the immediate and recurring needs of a beneficiary; however, in certain circumstances, capital also may be applied. The purposes of maintenance are usually the satisfaction of physical needs, such as food, clothing, and housing,[4] and medical and dental care. However, the testator or settlor may have other needs in mind, such as education, in which case he will authorize the trustees to make payments to an appropriate person for this purpose. The creator of the trust may also be concerned with other, as yet indiscernible, reasons that might justify payments at a future time. The maintenance power in these circumstances would probably authorize payments that the trustees consider to be for the "benefit" of the minor.

Although a gift to a minor may be vested in possession when the trust instrument takes effect, it may nevertheless be determinable or subject to defeasance by condition subsequent. The trust instrument may specify that on the occurrence or non-occurrence of some uncertain future event the gift is to come to an end,[5] and that the property in question is to pass to some other person or institution. Such a disposition to the minor is known as a vested gift subject to divestment or defeasance by condition subsequent. Alternatively, a gift to a minor may be vested in possession so long as a certain circumstance exists, for example, confinement to hospital. Upon the termination of the circumstance, the minor's release from hospital, the trust instrument may specify a gift over for another purpose, such as an equal sharing among the minor, his brothers and sisters. This gift to the minor is known as a vested, but determinable, gift.[6] Then again a gift may not be vested at all, but its vesting may be dependent upon some future event.[7] The gift may be conditional either upon that event occurring or, in some instances, upon the event not occurring. Such a gift is known as a contingent interest, because it is conditional or contingent on the occurrence or non-occurrence of a future event.[8]

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[4] See *Cook v. Noble* (1886), 12 O.R. 81 (H.C.J.).

[5] For example, the trust instrument might confer upon a beneficiary an unqualified interest, but subject to a condition of defeasance as follows: "if she sells the family home within ten years of my death", or "if he has not qualified as a doctor of medicine within ten years of my death".

Where the gift is subject to defeasance by condition subsequent, or is determinable or contingent, the question that arises is whether the power of maintenance may be exercised before it is known whether the gift will end by defeasance, determinability, or, in the case of a contingent gift, whether the gift will ever vest. If there is a gift over to another person or institution,[9] it may be argued that any payment or application of moneys for the minor's benefit could prove to be at the expense of the gift over.[10] Nonetheless, it has been the experience in most common law jurisdictions over the years that the majority of testators and settlors do not intend – by the imposition of defeasibility, determinability, or even contingency – that a beneficiary, in the years prior to the occurrence or non-occurrence of the specified future event, should be deprived of maintenance or other advantageous benefits. Rather, the intended object of most testators and settlors who insert such an imposition in the trust instrument is simply to provide for the disposition of property upon the occurrence of the specified event. Whether the gift to a minor is vested in possession, subject to defeasance by condition subsequent, determinable, or contingent, the minor, because of his incapacity, is not entitled to call for payment of the capital.

A power of advancement is an authority to pay capital to, or for the benefit of, a minor so that he may take advantage of some opportunity that will further him in life.[11] In the modern context, such an opportunity may take the form, for instance, of a chance to start a business, to make a significant down payment on a house, or to acquire a major piece of equipment with which to practise a profession or trade. More recently, benefits of other kinds have appeared in trust instruments: for instance, it may be advantageous to advance capital from a beneficiary's interest in order that he may pay the income tax due following his exercise with trustees of a preferred beneficiary election under the *Income Tax Act* (Canada).[12]

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[6] The determinable interest is sometimes described as a defeasible interest: see Moynihan, *Introduction to the Law of Real Property* (1962), at 35-37. However, this is not strictly correct. The defeasible interest results when a condition defeats or brings to a premature end an interest that would otherwise last longer. The determinable interest, on the other hand, lasts only until the occurrence of the contemplated event, at which time it comes to a natural end.

[7] Alternatively, the gift may be vested, but payment deferred, or postponed, until a later event occurs: for example, "the income of the fund to my son, A, for his life, payment to commence on his twenty-first birthday, the income being accumulated in the meantime". Such gifts may give rise, however, to the rule in *Saunders v. Vautier*: see *infra*, ch. 7.

[8] One of the most familiar examples in trust instruments of a contingent interest is as follows: "a third of my residuary estate to A on his attaining his majority".

[9] The term "gift over" usually refers to a limitation that is to come into effect if the first gift fails for any reason. If there is no such limitation in the trust instrument, the property will revert to the settlor's or testator's estate upon failure of the first gift.

[10] For example, a contingent gift may be made "to my nephew, A, on his attaining his twenty-fifth birthday, but if he does not attain that age, then to my nieces, B and C, equally". B and C could well take exception to the payment of school fees for A out of accumulated income, especially if he is well short of his twenty-fifth birthday.

The essential character of this power, however, is not so much the purposes for which it can be exercised, but that it authorizes the payment or application of capital. The payment of capital for the benefit of a beneficiary prior to his attainment of majority has serious implications. Unlike the payment of maintenance, the exercise of the power of advancement is not merely a matter of paying out income in a year of need, but, rather, it represents an incursion into the very substance of the gift. A power of advancement, if exercised freely, although for justifiable purposes, could result in there being little or no gift left when majority is attained or, where the gift is defeasible, determinable, or contingent, in the gift over being partly or wholly depleted.

For this reason, the power of advancement was less familiar in years past than was the power of maintenance. Possibly, donors felt some concern that by the exercise of the power the essential character of the gift could be changed. However, it is notable that increasingly since the Second World War these hesitations on the part of testators and settlors have apparently diminished. Creators of gifts appear more willing to see both income and capital made available for the legitimate needs of their beneficiaries. Moreover, many precedents employed in Ontario today impose no limitations upon the amount of capital that may be paid by way of advancement.[13] Evidently, taking the same attitude as they have always taken with income, donors today are prepared to leave with the trustees decisions concerning the appropriateness of capital dispositions.

Another dispositive device is the so-called "discretionary trust". In such a case, the trust instrument will designate a class of beneficiaries, or a number of named beneficiaries, and will confer upon trustees one or more of the following discretions. First, the trustees may merely be authorized to decide the amount that each of the named beneficiaries, or class of beneficiaries, is to receive.[14] Alternatively, they may be authorized to determine not only the amount that each beneficiary is to receive, but also when receipt is to take place.[15] Lastly, powers may be conferred upon trustees to choose among the class of beneficiaries, or the named beneficiaries, the person who shall receive a benefit.[16] It is in this third situation that trustees determine who shall be the actual, as opposed to the possible, beneficiaries of trust property, although the trust instrument will usually indicate the purposes for which the property is to be distributed.

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[11] Maintenance assumes periodic, small payments, while advancement usually entails a one-time payment of a significant amount. See, further, *infra*, at 343.

[12] *Income Tax Act*, S.C. 1970-71-72, c. 63, s. 104(14) and (15), as amended.

[13] A typical power employed in Ontario today will authorize the use of both income and capital, and not impose any restrictions upon the use of capital other than to assume that current and accumulated income will be exhausted first. For example, an *inter vivos* trust set up by the settlor for his children as of the date of the settlement might provide that the trust fund is to be divided between the children equally, each child to receive his share on attaining the age of thirty years, with the following power conferred upon the trustees:

> The Trustees may from time to time pay to or apply for the benefit of each child the whole or such portion of the net income derived from such share (or from the part thereof from time to time remaining in trust) and, if necessary, such part or parts of the capital thereof as the Trustees in their uncontrolled discretion from time to time consider necessary or advisable for the care, maintenance, education, advancement in life or other benefit of such child.

In this instance, both income and capital may be drawn upon for the purposes of maintenance and advancement.

Finally, and indirectly related to the discretionary trust, is the so-called "protective trust". In the United States, a trust with the same general purpose is known as a "spendthrift trust". The essential purpose of a protective trust is the protection of a beneficiary from the deprivation that would flow from the forfeiture, or the alienation, of the interest given to that beneficiary. The gift takes the form of an income interest, normally a life tenancy, that terminates upon forfeiture or attempted alienation of the interest. Termination of the life interest gives rise to a discretionary trust, the beneficiaries of which are usually the former life tenant and his immediate family. During the remainder of what would have been the period of the income interest, trustees are empowered to make such payments of income for the maintenance, support, or other benefit of any one or more of the class of beneficiaries as the trustees in their sole discretion think fit.

Having reviewed briefly the various kinds of dispositive power, the issue that the Commission has considered is whether the revised *Trustee Act* should include powers of this nature, and, if so, what form these powers should take. In this regard, the Commission is of the opinion that the powers of maintenance and of advancement deserve our detailed attention. Likewise, it is our view that the concept of the protective trust should be examined, and we propose to do so in the broader context of restraint on alienation and enjoyment of gifts. It is to these three areas that we now turn our attention.

2. POWER OF MAINTENANCE

(a) ONTARIO

The Ontario *Trustee Act*[17] contains no express statutory power of maintenance. Accordingly, trustees, for the most part, must rely upon either an express power of maintenance contained in a trust instrument, or, in the absence of such an express power, the inherent jurisdiction of the court. However, before proceeding to comment upon the inherent jurisdiction of the court, we wish to mention briefly two, albeit indirect, statutory modes of obtaining maintenance payments for infant beneficiaries.

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[14] For example, a will may state "on the tenth anniversary of my death to distribute the capital among each of my children then living in such shares as my trustees consider appropriate".

[15] For example, the trust instrument may provide: "to divide my residuary estate among my grandchildren living at my death in such shares, and to make payments at such times, as my trustees shall choose".

[16] An example of such a trust would be the following: "to pay or apply the capital to or for the benefit of such of my nephews and nieces as my trustees shall choose, and in such circumstances as they shall choose". In such a case, the testator or settlor might expressly contemplate that not all of the trust property need be distributed, and may provide that any residue is to become part of the estate.

[17] *Trustee Act*, R.S.O. 1980, c. 512.

First, section 36(4) of the Ontario *Trustee Act* requires a trustee, on the passing of his final accounts in the Surrogate Court, to pay any money in his hands belonging to a minor into the Supreme Court. Moreover, by virtue of section 36(6) of the *Trustee Act*, where a minor is entitled to any money, the person by whom the money is payable may pay the money into the Supreme Court to the credit of the minor, and this will be a sufficient discharge to the payor. If funds are subsequently required for maintenance, the Official Guardian may, where a minor is absolutely entitled to the funds, apply under Rule 741 of the Rules of Practice to a judge who may authorize a payment out of court without formal order.[18]

The other statutory jurisdiction of the court to order maintenance stems from the Ontario *Children's Law Reform Act*.[19] Pursuant to this Act, the court may order the sale or other disposition of a minor's property for the purpose of support, education, or substantial benefit of the minor.[20] For present purposes, a significant provision appears in section 60(4). This subsection specifies that "[t]he Supreme Court shall not require or approve a disposition or encumbrance of the interest of a child in land contrary to a term of the instrument by which the child acquired the interest".[21] The effect of this provision would appear to be that, although the court can order a disposition where land is devised or granted absolutely to a minor, any disposition, where the interest of the minor is vested with deferred possession, or is contingent, would be precluded by section 60(4) as being "contrary" to the instrument by which the interest was acquired by the minor. In any event, the court must determine whether, despite the deferral of possession or the contingency, the testator or grantor nevertheless implied that support or education payments might be made out of the property in question.[22]

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[18] Supreme Court of Ontario Rules of Practice, R.R.O. 1980, Reg. 540, r. 741. See, also, Province of Ontario, Ministry of the Attorney General, Civil Procedure Revision Committee, untitled report (June, 1980), Proposed Rules of Civil Procedure, r. 75.02(4), which refers to "a person under disability", rather than "a minor". Reference to draft r. 7.01(a) would indicate that "a person under disability" includes "a minor".

[19] *Children's Law Reform Act*, R.S.O. 1980, c. 68, as am. by the *Children's Law Reform Amendment Act, 1982*, S.O. 1982, c. 20.

[20] *Ibid.*, s. 60(1) and (2). These subsections are an amended, updated version of ss. 4(1) and 11 of the *Minors Act*, R.S.O. 1980, c. 292, which was repealed by the *Children's Law Reform Amendment Act, 1982*. See, also, s. 61 of the *Children's Law Reform Act*, which provides that, where property is given beneficially to a person for his life with a power of devising or appointing the property by will in favour of his children or one or more of them, the Supreme Court may order that such portion of the proceeds of the property as it considers proper shall be applied towards the support, education, or benefit of any minor child in whose favour the power might be exercised.

[21] This restriction presumably does not apply to personalty, a distinction maintained from the predecessor s. 11 of the *Minors Act*, *supra*, note 20.

[22] For a discussion of these provisions, first enacted in *An Act Respecting Infants*, R.S.O. 1897, c. 168, see Kingsford, *The Law Relating to Executors and Administrators in the Province of Ontario* (2d ed., 1914), Part III, ch. 7.

The court may exercise broader powers of maintenance pursuant to its inherent jurisdiction. Although, during the nineteenth century, differences of opinion were expressed concerning the procedures required to invoke the inherent jurisdiction of the Ontario courts to grant maintenance, the principles of substantive law seem to have been relatively well settled. The court had to be assured that the need of the beneficiary did in fact exist, that income and capital ultimately destined for the beneficiary were available, and that the interests of others under the trust were not prejudiced. Whether it was income or capital[23] that was requested for maintenance, nineteenth century courts under their inherent jurisdiction punctiliously carried out their self-determined duty to be guided by the express or implied intent of the testator or settlor.[24] While the court was unwilling to interfere with the intention of the testator or settlor,[25] nevertheless, where there existed an obvious need, the court would always make moneys available for maintenance, and it appears that trustees would often make payments for maintenance without prior judicial consent, if they considered that they had justification. However, trustees would still run the risk that the court might disallow the payment when the trustees' accounts were presented for certification.[26]

While it may be asserted today that the courts are more willing than in former years to grant maintenance, it is true to say that the essential characteristics of the inherent jurisdiction have continued unchanged. As in the past, the crucial factor that the courts will seek to determine is the intention of the creator of the trust. If there is no express power contained in the trust instrument, the courts will ask whether the terms of the trust instrument require that this intention be implied. In construing these terms, the court may decide that the settlor or testator intended that a fund, other than the minor's interest, should be available for maintenance. If this is the case, but that fund has proved inadequate, or if no such intention can be implied, there must be a further examination of the trust instrument to determine whether, where there is a gift of principal to a minor, even though this interest has not yet vested in possession, it was intended that the minor's interest should be available for the purpose of maintenance.[27] Whether or not such an intention is implied depends primarily upon the nature of the gift of the principal. The more specific the gift the testator or settlor has made, the more likely it is that the courts will infer that he wished the beneficiary to have that specific property, and nothing more: for example, a bequest of "$5,000 to A on his attaining his twenty-fifth birthday". On the other hand, a bequest of "the rest and residue of my estate to B on his marrying C" may be construed as a gift of the entire residue of the testator's estate and, therefore, as a gift of the income generated by the residue.

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[23] The courts have generally been reluctant to allow capital to be used for maintenance: see *Crane v. Craig* (1886), 11 P.R. 236; *Re Green* (1908), 9 W.L.R. 630 (Sask.); and *Re Mason*, [1946] 4 D.L.R. 299 (N.S.S.C.).

[24] Concerning the court's requirement that an insurance policy be taken out against the possible vesting of a gift over, see *Re Campbell* (1889), 18 P.R. 400, and *Hodgins v. Amos* (1917), 12 O.W.N. 348 (H.C. Div.).

[25] For example, where the trust instrument had made provision for maintenance, but the provision was inadequate, the courts were most unlikely to order that further provision should be made: see Kingsford, *supra*, note 22, para. 966, at 373 *et seq*.

[26] *Edwards v. Durgen* (1872), 19 Gr. 101, at 104, and *Re Hollis Estate* (1911), 19 O.W.R. 806 (H.C.J.).

[27] *Re McIntyre* (1904), 7 O.L.R. 548 (H.C.J.), aff'd (1905), 9 O.L.R. 408 (C.A.).

Another factor considered by the court in the exercise of its inherent jurisdiction is whether the gift is vested in possession, vested with a deferred payment date, or contingent.[28] In this regard, in the absence of express directions to the contrary, settled rules of construction govern whether intermediate income is carried by a gift of principal, and, therefore, whether that income is available for maintenance payments.[29]

An interest that is vested in possession in a minor carries the intermediate income, as the only impediment to its transfer is the incapacity of the minor to receive the gift. Similarly, where the interest is vested in possession, but defeasibly or determinably, intermediate income is available for maintenance; in this instance, the beneficiary is considered to be entitled to the interest until the defeasance or determining event occurs. If the vested interest is made subject to a deferred payment date, whether the interest be defeasible or determinable, this might well be regarded as evidence that the donor did not intend any payment to be made to or for the use of the minor until that date occurs.[30] It is now clear, however, in Canada that a vested interest of whatever kind, whether of personalty or realty, is presumed to carry the intermediate income if the gift is of residue.[31] But if the gift is a general or specific devise or bequest, that presumption does not arise.

If the gift is contingent, other presumptions apply. A contingent interest of residuary personalty will be presumed to carry the intermediate income. Despite the contingency, the fact that the property is personalty and residue will conclude the matter. The same presumption is made if the residuary gift is of mixed realty and personalty. However, a contingent devise of residuary realty alone is not presumed to carry the intermediate income. The same interpretation also applies to a contingent devise or bequest, whether general or specific; that is, whether land or personalty is involved, there is no presumption that the beneficiary is intended to enjoy the intermediate income.

Even where, under the principles mentioned above, there is no presumption that the devise or bequest was intended to carry the intermediate income, the matter is not necessarily concluded. If one or more of four conditions is met, there is a presumption that any interest, whether vested or contingent, is to carry the intermediate income.[32] We need not examine the four conditions in detail here;[33] the only point we wish to make is that an application to the court for maintenance on behalf of a beneficiary can give rise to complex questions of construction.

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[28] See *In re Bowlby*, [1904] 2 Ch. 685 (C.A.), and *In re Abrahams*, [1911] 1 Ch. 108.

[29] See *In re Geering*, [1964] Ch. 136, at 143.

[30] This is, in fact, the position in England: see *Berry v. Geen*, [1938] A.C. 575, [1938] 2 All E.R. 362 (H.L.).

[31] *Watson v. Conant*, [1964] S.C.R. 312, 44 D.L.R. (2d) 346. See, also, Waters, *supra*, note 2, at 771.

So far in our discussion we have assumed that the gift to the minor has been an absolute interest. At common law, the matter is even more in doubt if the testator or settlor has not given an absolute interest, but rather a life or other limited interest. For instance, suppose the testator gives a life interest in a fund to X "on X attaining 25", remainder to Y absolutely. X is fourteen years of age when the testator dies. Can the trustees make payments for the maintenance of X out of the income that arises before he attains his twenty-fifth birthday? Or, if it has not been otherwise disposed of by the will, does the income have to be accumulated, the accumulations being added to capital? If maintenance is possible, can it be paid only out of current income on the reasoning that accumulated income has already accrued to capital? Alternatively, can a life beneficiary base a claim to maintenance from accumulated income on the assumption that the creator of the trust intended to separate income and capital, so that accumulated income should not be considered to accrue to capital and, therefore, is impliedly available for his maintenance?

Finally, there is the question of the period during which moneys may be applied for maintenance or paid to the beneficiary for that purpose. The traditional view of the Ontario courts is that maintenance is justifiable only during minority. However, there may be particular problems that develop after the testator's death, such as physical or mental incapacity or the need to complete higher education, which justify maintenance payments after the attainment of majority. Nevertheless, there are few reported cases where the court has made an order for payments beyond a period of minority.[34]

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[32] The four conditions are as follows:

(1) the donor is the parent of or *in loco parentis* to the beneficiary, and has made no other provision for maintenance, and, if the contingency is the attaining of an age, it is no later than the attaining of majority;

(2) the subject matter of the gift is expressly or impliedly directed to be at once set apart from the general estate for the benefit of the beneficiary in question;

(3) the gift is to a class of infants with gifts over to the survivors, so that one of the class must ultimately take the subject matter; or

(4) the persons entitled on failure of the contingent estate give their consent to payment for maintenance.

See *Binkley v. Binkley* (1869), 15 Gr. 649, and *Spark v. Perrin* (1870), 17 Gr. 519.

[33] See, further, *Re Richardson* (1912), 22 O.W.R. 605, 5 D.L.R. 449 (H.C.J.); *Rees v. Fraser* (1879), 26 Gr. 233; *In re Bowlby*, *supra*, note 28; *Re McIntyre*, *supra*, note 27; and *The Royal Trust Co. v. Globe Printing Co.*, [1934] O.W.N. 547 (C.A.). See, also, Dale (ed.), *Lewin on Trusts* (11th ed., 1904), at 732.

[34] See, for example, *Re Wright*, [1954] O.R. 755, [1955] 1 D.L.R. 213 (H.C.J.) (subsequent references are to [1954] O.R.), and *Re McCallum*, [1956] O.W.N. 321, [1956] 2 D.L.R. (2d) 618 (H.C.J.). In the *McCallum* case, the Court held that, even though the gift was contingent upon the donee achieving 30 years of age, the gift carried the intermediate income, and the Court had a discretion, even in the case of an adult contingent beneficiary, to allow him a sum for maintenance, pending his attainment of the required age, for example, to enable him to complete his education.

In one important case, *Re Wright*,[35] Gale J. noted that, while it is only in special circumstances and on rare occasions that a court will rewrite a will or readjust a trust settlement, this fundamental rule may not apply where maintenance is ordered to be paid out of income directed to be accumulated. This exception, Gale J. stated, is based upon the assumption that, where a testator has provided for his family, but has postponed the enjoyment of the estate, he did not intend that his children should be left unprovided for or in such a state that they cannot be educated properly for the position and fortune he intends them to have.[36] In *Re Wright*, maintenance was increased for beneficiaries whose interests were not to vest in possession until the attainment of twenty-five years of age.

(b) ENGLAND

In England, prior to 1860,[37] where the trust instrument did not contain an express power of maintenance, trustees had to rely upon the inherent jurisdiction of the Court of Chancery to make orders authorizing payments for support and educational needs. Indeed, since the early eighteenth century, the courts had assumed the role of authorizing such relief as an obviously justified response to cases of need where the interest of the beneficiary was vested, but where he was under age or where vesting in possession was deferred to a later date.[38] However, application to the court involved delay and costs and, as we have previously discussed, often raised the issue of the intent of the settlor or testator. Consequently, before 1860, it was the practice of well-drawn trust instruments to provide express powers of maintenance, which would put the intention of the creator of the trust beyond question.

In 1860, Parliament in England began to confer upon trustees certain administrative powers that well-advised settlors and testators typically gave to their trustees. As part of this process, legislation of that year gave statutory form to the then usual form of the power of maintenance, subject to the standard proviso that the creator of the trust was free to modify or withhold the power if he chose so to do. Section 26 of *Lord Cranworth's Act*[39] authorized payments for the "maintenance or education" of infants, where any interest, whether contingent or vested in possession, with or without a deferred payment date, was an absolute interest, as opposed to a life interest, and where vesting in possession was to occur, if at all, during minority or upon the attainment of majority. The duty of the parents to provide for the infant, and the existence of other funds available for maintenance, were made irrelevant considerations. Past accumulations of income could be used for current maintenance needs should current income prove insufficient at any time.

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[35] *Re Wright*, *supra*, note 34.

[36] *Ibid.*, at 760.

[37] This was the year of passage of *An Act to give to Trustees, Mortgagees, and others certain Powers now commonly inserted in Settlements, Mortgages, and Wills* (1860), 23 & 24 Vict., c. 145 (U.K.), commonly known as *Lord Cranworth's Act*.

[38] See, further, Lewin, *The Law of Trusts* (5th ed., 1867), at 419-21.

[39] *Supra*, note 37, s. 26.

The shortcomings of this provision were that it did not include interests that were vested, but defeasible,[40] and did not apply if the deferred payment date or contingency depended upon an event that might occur after the beneficiary had attained majority. Moreover, the section applied only in those circumstances where the gift carried the intermediate income, as established by the case law.[41]

In 1881, section 26 of the Act of 1860 was repealed and replaced by section 43 of the *Conveyancing and Law of Property Act, 1881*.[42] The changes were not considerable, and the new provision was poorly drafted in certain respects.[43] Section 43 provided, for the first time, however, that maintenance might be paid out of income arising from a life estate, but vested defeasible interests continued to remain outside the Act. The purposes for which payments might be made were extended to include payments for the "benefit" of the infant. Like the 1860 provision, the only contingencies included were those of attaining majority or the occurrence of an event under that age, and it was still necessary to show that the gift in question carried the intermediate income at common law.[44] The power of trustees to draw upon accumulated income in order to pay or reimburse for past maintenance was also left open.

The English *Trustee Act, 1925*[45] repealed the 1881 provision and in its place enacted a further revised and modernized power of maintenance, which is the maintenance power in force today in England. Section 31(1) of the Act provides as follows:

> 31.—(1) Where any property is held by trustees in trust for any person for any interest whatsoever, whether vested or contingent, then, subject to any prior interests or charges affecting that property –
>
> (i) during the infancy of any such person, if his interest so long continues, the trustees may, at their sole discretion, pay to his parent or guardian, if any, or otherwise apply for or towards his maintenance, education, or benefit, the whole or such part, if any, of the income of that property as may, in all the circumstances, be reasonable, whether or not there is –
>
> (*a*) any other fund applicable to the same purpose; or
>
> (*b*) any person bound by law to provide for his maintenance or education; and

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[40] *In re Buckley's Trusts* (1883), 22 Ch. D. 583.

[41] *In re George* (1887), 5 Ch. D. 837 (C.A.).

[42] *Conveyancing and Law of Property Act, 1881*, 44 & 45 Vict., c. 41, s. 43 (U.K.).

[43] Entitlement to accumulated income was the part of the new section that was most affected by the poor drafting, and this difficulty arose largely because the legislature had not properly integrated the life interest into what was essentially the 1860 provision. The result was that a minor with a vested and indefeasible life interest lost to capital the accumulations that arose during his minority.

[44] *In re Dickson* (1885), 29 Ch. D. 331 (C.A.).

[45] *Trustee Act, 1925*, 15 & 16 Geo. 5, c. 19 (U.K.).

> (ii) if such person on attaining the age of eighteen years [46] has not a vested interest in such income, the trustees shall thenceforth pay the income of that property and of any accretion thereto under subsection (2) of this section to him, until he either attains a vested interest therein or dies, or until failure of his interest:
>
> Provided that, in deciding whether the whole or any part of the income of the property is during a minority to be paid or applied for the purposes aforesaid, the trustees shall have regard to the age of the infant and his requirements and generally to the circumstances of the case, and in particular to what other income, if any, is applicable for the same purposes; and where trustees have notice that the income of more than one fund is applicable for those purposes, then, so far as practicable, unless the entire income of the funds is paid or applied as aforesaid or the court otherwise directs, a proportionate part only of the income of each fund shall be so paid or applied.

By section 31(1), all interests of whatever nature or duration are made eligible for maintenance payments, and thus all vested interests, whether defeasible, determinable, or with a deferred payment date, as well as contingent interests, are included, whenever the contemplated event is to occur. During infancy, the trustees, in their sole discretion, may pay such amounts of income for maintenance as may in all the circumstances be reasonable. If upon the attainment of majority the interest of the beneficiary has not vested in possession, discretionary maintenance payments cease, and the full annual income is to be paid to the adult beneficiary until the vesting of the interest in possession. In the result, where a beneficiary is entitled to a contingent interest after his eighteenth birthday, the interest becomes, in effect, a contingent interest only in the capital.

If, however, the trust instrument directs that income arising after majority is to be accumulated, this has been interpreted to mean that it will accrue to capital.[47] Therefore, in such a case, the beneficiary of a contingent interest who is an adult acquires neither the whole income nor maintenance out of the income, unless, of course, the testator or settlor has made clear his intention to the contrary.

One novel feature introduced by the 1925 legislation is the requirement that trustees should have regard to particular conditions before determining whether maintenance payments are appropriate. Specifically, by the proviso to section 31(1), trustees are to consider the age of the infant, his requirements, and the circumstances of the case, with particular regard to the income, if any, of another fund, if such income is available for the beneficiary's maintenance.

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[46] By the *Family Law Reform Act 1969*, c. 46 (U.K.), s. 1(3), and Sch. I, Part I, "eighteen" was substituted for "twenty-one", but by s. 1(4) of that Act and Sch. 3, para. 5(1), "twenty-one" remains the relevant age for interests under trust instruments made before 1970.

[47] *In re Turner's Will Trusts*, [1937] Ch. 15 (C.A.), foll'd in *Re Watt's Will Trusts*, [1936] 2 All E.R. 1555 (Ch. D.).

Section 31(2) of the English *Trustee Act, 1925* provides for the disposition of excess income that is accumulated during infancy, and states as follows:

> 31.—(2) During the infancy of any such person, if his interest so long continues, the trustees shall accumulate all the residue of that income in the way of compound interest by investing the same and the resulting income thereof from time to time in authorised investments, and shall hold those accumulations as follows: –
>
> (i) If any such person –
>
> (*a*) attains the age of eighteen years, or marries under that age, and his interest in such income during his infancy or until his marriage is a vested interest; or
>
> (*b*) on attaining the age of eighteen years or on marriage under that age becomes entitled to the property from which such income arose in fee simple, absolute or determinable, or absolutely, or for an entailed interest;
>
> the trustees shall hold the accumulations in trust for such person absolutely, but without prejudice to any provision with respect thereto contained in any settlement by him made under any statutory powers during his infancy, and so that the receipt of such person after marriage, and though still an infant, shall be a good discharge; and
>
> (ii) In any other case the trustees shall, notwithstanding that such person had a vested interest in such income, hold the accumulations as an accretion to the capital of the property from which such accumulations arose, and as one fund with such capital for all purposes, and so that, if such property is settled land, such accumulations shall be held upon the same trusts as if the same were capital money arising therefrom;
>
> but the trustees may, at any time during the infancy of such person if his interest so long continues, apply those accumulations, or any part thereof, as if they were income arising in the then current year.

Accordingly, trustees are to accumulate income and to hold accumulations in trust absolutely for the following persons: first, a beneficiary who attains majority or marries under that age and whose interest prior to these events occurring is a vested interest; and secondly, a beneficiary who, upon attaining majority or upon marriage under that age, becomes entitled to the capital out of which the income arose. In any other case, accumulated income accrues to the capital of the property. The object of this complex subsection appears to be to exclude from entitlement to accumulated income the following persons: first, a beneficiary with a vested life interest who dies an infant and unmarried;[48] secondly, a beneficiary with a contingent interest where the event is one that will happen, if at all, later than the attainment of majority;[49] and finally, it would seem, a beneficiary with a vested life interest during minority, but with payment deferred to the age of majority or a later occasion. However, it should be recalled that a beneficiary denied accumulated income under section 31(2) may, nonetheless, be the recipient of discretionary maintenance payments during infancy and the full annual income after attaining majority under section 31(1).

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[48] The person with a vested interest in fee simple during infancy who dies unmarried before attaining majority is also denied the accumulations under s. 31(2)(i)(*a*) of the English *Trustee Act, 1925*, *supra*, note 45, but his personal representatives acquire the accumulations as an accretion to capital under s. 31(2)(ii) of the Act.

Section 31(3) of the English Act deals with contingent interests, and provides as follows:

> 31.—(3) This section applies in the case of a contingent interest only if the limitation or trust carries the intermediate income of the property, but it applies to a future or contingent legacy by the parent of, or a person standing in loco parentis to, the legatee, if and for such period as, under the general law, the legacy carries interest for the maintenance of the legatee, and in any such case as last aforesaid the rate of interest shall (if the income available is sufficient, and subject to any rules of court to the contrary) be five pounds per centum per annum.

Section 31(3) continues the requirement that, for the statutory scheme of maintenance to apply, a contingent interest must carry the intermediate income at common law. This is of crucial importance, as litigation interpreting the section has established.[50] In the case of wills, section 175 of the *Law of Property Act, 1925*[51] states that the interests enumerated therein shall carry the intermediate income, unless that income is otherwise expressly disposed of, but the courts have held that this list is not comprehensive.[52] Moreover, no change to the common law has been made for *inter vivos* trusts. Although there has not been a great deal of litigation concerning section 31 of the English *Trustee Act, 1925* since it was enacted, the cases that have been litigated have been complex, and have given rise to some very fine distinctions.[53]

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[49] Such a person must await the event before he acquires the accumulations, and then he so acquires because the accumulations have earlier accrued to capital.

[50] See Keeton and Sheridan, *The Law of Trusts* (10th ed., 1974), at 291-94.

[51] *Law of Property Act, 1925*, 15 & 16 Geo. 5, c. 20 (U.K.). Section 175(1) provides as follows:

> 175.—(1) A contingent or future specific devise or bequest of property, whether real or personal, and a contingent residuary devise of freehold land, and a specific or residuary devise of freehold land to trustees upon trust for persons whose interests are contingent or executory shall, subject to the statutory provisions relating to accumulations, carry the intermediate income of that property from the death of the testator, except so far as such income, or any part thereof, may be otherwise expressly disposed of.

[52] See *In re Raine*, [1929] 1 Ch. 716, where it was held that s. 175 did not apply to a contingent or future pecuniary testamentary legacy. See, also, *Re McGeorge*, [1963] All E.R. 519 (Ch. D.).

[53] For a full discussion of s. 31, see *Lewin on Trusts*, *supra*, note 2, at 292-98; *Underhill's Law relating to Trusts and Trustees*, *supra*, note 2, at 580-89; and Keeton and Sheridan, *supra*, note 50, at 290-97.

(c) OTHER JURISDICTIONS

(i) Canada

The trustee legislation of the common law jurisdictions in Canada assumes a variety of positions. Ontario, as we have seen, makes no provision in its *Trustee Act* for maintenance and, in this regard, stands alone among its counterparts in the other provinces and territories.

Several of the Canadian jurisdictions have incorporated in their trustee legislation the maintenance provision of *Lord Cranworth's Act*.[54] Newfoundland[55] has adopted the provision without alteration, while British Columbia,[56] Saskatchewan,[57] the Yukon,[58] and the Northwest Territories[59] have added a power that enables trustees, by leave of a judge, to sell and dispose of any portion of the realty or personalty of an infant for his maintenance or education, where the income arising from such property is insufficient for these needs, a provision that, as noted previously, is included at present in the Ontario *Children's Law Reform Act*.[60] These provisions are also in force in Alberta, but only for trusts created by instrument or otherwise prior to January 1, 1975;[61] trusts created on or after that date are governed by provisions more akin to section 31 of the English *Trustee Act, 1925*.[62]

The Saskatchewan Act provides further detailed provisions concerning maintenance payments that are worth noting. First, in the case of contingent interests, the restriction of the contingency to the attainment of majority or the occurrence of an event under that age, found in *Lord Cranworth's Act*, is absent; section 52 of the Saskatchewan Act only specifies that the interest be held for the beneficiary "absolutely or contingently".[63] Secondly, where money is held by an executor or administrator in trust for an infant, he may, by order of a judge, pay to the guardian of the infant, or otherwise apply towards his maintenance or education, the whole or part of the fund.[64] Finally, where the total assets held in trust for an infant are not more than $10,000, the Official Guardian may consent to the sale of the infant's property for his maintenance or education, thereby obviating the necessity for judicial approval.[65] The requirement of judicial approval, as we have noted, is contained in the Ontario *Children's Law Reform Act* and the trustee legislation of the provinces and territories mentioned above.

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[54] *Supra*, note 37, s. 26.

[55] *The Trustee Act*, R.S.N. 1970, c. 380, s. 27.

[56] *Trustee Act*, R.S.B.C. 1979, c. 414, ss. 24 and 25. Section 26 further provides that, in the circumstances set forth in s. 25, the purchaser from trustees obtains good title, and that the deed of conveyance effectually exonerates "the person paying the money from seeing to its application or from being answerable for its loss or misapplication".

[57] *The Trustee Act*, R.S.S. 1978, c. T-23, ss. 52 and 54.

[58] *Trustee Ordinance*, R.O.Y.T. 1978, c. T-5, ss. 32 and 33.

[59] *Trustee Ordinance*, R.O.N.W.T. 1974, c. T-8, ss. 29 and 30.

[60] *Supra*, note 19, s. 60. This statutory power appears to have originated in the *An Act Respecting the Court of Chancery*, C.S.U.C. 1859, c. 12, s. 50. British Columbia, Alberta, and Saskatchewan transferred this power from their provincial Infants Acts to their provincial Trustee Acts.

[61] *Trustee Act*, R.S.A. 1980, c. T-10, ss. 33 and 36.

[62] *Ibid.*, ss. 34, 35, and 37.

[63] Saskatchewan *Trustee Act*, *supra*, note 57, s. 52. This amendment nonetheless does not result in the inclusion of a life tenant or a beneficiary with an absolute vested, but defeasible, interest.

The trustee legislation of Nova Scotia[66] and New Brunswick[67] has adopted the maintenance provision that was contained in the English *Conveyancing and Law of Property Act, 1881*.[68] New Brunswick did not alter the English precedent, whereas Nova Scotia expanded the nature of infants' interests comprehended by the maintenance provision; the *Trustee Act* of Nova Scotia provides that the maintenance power is available for an interest that is contingent upon an infant attaining his majority "or any other age", or upon the occurrence of any event before his attaining such age. As a result, any contingent event occurring before the specified age is included, but an event occurring after a specified age or unrelated to an age still remains excluded from the section.

The remaining two common law provinces, Manitoba[69] and Prince Edward Island,[70] incorporate in their trustee legislation a modified version of section 31 of the English *Trustee Act, 1925*,[71] and, as we mentioned previously, the Alberta *Trustee Act* does likewise, but only for trusts created on or after January 1, 1975.[72] However, under the Manitoba legislation accumulated income may be distributed to an infant only upon his attaining the age of majority,[73] and not, like the English Act, upon marriage under that age. Alberta makes two other changes regarding accumulated income. While entitling a beneficiary to receive accumulations when he attains majority if his interest vests at that time, the Act also stipulates that, where the beneficiary is entitled to the payment of the income at a time subsequent to attaining majority, the accumulated income must be held until that time.[74] Moreover, the Alberta Act provides that, where a vested owner dies prior to the defeasance of his interest, the income accumulations shall accrue to his estate.[75] The Alberta legislation departs from the English scheme in other respects. First, it extends the purposes for which income payments may be applied to the "advancement" of a beneficiary.[76] Secondly, where a beneficiary's interest does not vest until some time after the attainment of majority, the Alberta Act, rather than authorizing the actual income to be paid to that beneficiary after majority, as does the English 1925 provision, permits trustees to continue to make discretionary income payments to that beneficiary for his maintenance, education, benefit, or advancement.[77]

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[64] *Ibid.*, s. 53. The payment authorized by the court in any one year shall not exceed $1,200, plus the actual cost of tuition fees, books and equipment in connection with the infant's education, and such extraordinary expenses as the judge thinks fit to allow out of the fund: see s. 53(2). Moreover, the restrictions upon permitted contingencies contained in *Lord Cranworth's Act* are made applicable in this case: see *supra*, note 57, s. 53(1).

[65] *The Trustee Act*, *supra*, note 57, s. 55.

[66] *Trustee Act*, R.S.N.S. 1967, c. 317, s. 29.

[67] *Trustees Act*, R.S.N.B. 1973, c. T-15, s. 14.

[68] *Supra*, note 42.

[69] *The Trustee Act*, R.S.M. 1970, c. T-160, s. 31.

[70] *Trustee Act*, R.S.P.E.I. 1974, c. T-9, s. 39.

[71] *Supra*, note 45. Manitoba, Alberta, and Prince Edward Island have deleted the references contained in the English section that extend the power of maintenance to settled land. Such an extension would have been inapplicable to the property regimes in these provinces.

[72] Alberta *Trustee Act*, *supra*, note 61, ss. 34, 35, and 37.

[73] Manitoba *Trustee Act*, *supra*, note 69, s. 31(5). See, also, English *Trustee Act, 1925*, *supra*, note 45, s. 31(2)(i).

The Prince Edward Island provision also differs somewhat from the English *Trustee Act, 1925*. First, it contains no reference to the conditions that trustees should consider when exercising the power of maintenance.[78] Secondly, the statutory power is made available where a life tenant surrenders his interest to trustees, and where they hold the income that arises for an infant remainderman.[79] Finally, the Prince Edward Island Act alters the language of the English requirement that an interest must carry the intermediate income under the common law before the statutory power of maintenance is available.[80] Presumably, the intention of the legislation was to stipulate that all contingent interests should carry the intermediate income, unless that income is expressly disposed of otherwise by the trust instrument. As drafted, however, the subsection does not appear to effect this change, and, as a result, the common law requirements would seem to continue.[81]

(ii) Australia and New Zealand

New Zealand[82] and all the Australian states,[83] except Tasmania, have adopted section 31 of the English *Trustee Act, 1925*,[84] although some of these jurisdictions have amended various aspects of the English provision.[85] We do not find it necessary here to analyze each of the changes enacted in these jurisdictions, but several of the versions should be noted. The trustee legislation of Queensland, South Australia, Victoria, Western Australia, and New Zealand has broadened the power to permit income to be applied for purposes of "advancement", as well as "maintenance, education, and benefit".[86] Further, Queensland, Western Australia, and New Zealand authorize the payment of income for past maintenance or education.[87]

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[74] Alberta *Trustee Act*, *supra*, note 61, s. 35(2)(a) and (b).

[75] *Ibid.*, s. 35(2)(c).

[76] *Ibid.*, s. 34(1)(a)(ii).

[77] *Ibid.*, s. 34(1)(b).

[78] See English *Trustee Act, 1925*, *supra*, note 45, s. 31(1), and the Manitoba *Trustee Act*, *supra*, note 69, s. 31(2).

[79] Prince Edward Island *Trustee Act*, *supra*, note 70, s. 39(4).

[80] English *Trustee Act, 1925*, *supra*, note 45, s. 31(3).

[81] See Waters, *supra*, note 2, at 783. Section 39(3) of the Prince Edward Island Act, *supra*, note 70, states that: "[t]his section applies in the case of a contingent interest only if and to the extent that the income is not expressly otherwise disposed of by the instrument creating the trust". Rather than abrogating the common law rules relating to contingent interests and intermediate income, the subsection seems merely to provide that a contingent interest cannot carry the intermediate income if a testator or settlor has expressly given it to another, which is the position under existing common law.

[82] *Trustee Act 1956*, Repr. Stat. N.Z. 1977, No. 61, s. 40.

[83] *Trustee Act, 1925*, Stat. N.S.W. 1824-1957, Vol 11, No. 14, s. 43; *Trustee Act 1958*, Vict. Stat. 1958, No. 6401, s. 37; *Trustees Act, 1962*, W. Austl. Acts 1962, No. 78, s. 58; *Trusts Act 1973*, Queensl. Stat. 1973, No. 24, s. 61; and *Trustee Act, 1936-1974*, S. Austl. Stat. 1837-1975, s. 33.

[84] *Supra*, note 45.

It will be recalled that section 31 of the English *Trustee Act, 1925* provides that, where a beneficiary's interest remains contingent after he attains majority, he shall receive the annual income from his interest as it arises. This approach has been adopted by Victoria, Western Australia and New Zealand.[88] The remaining jurisdictions take two different paths. The *Trustee Act, 1925* of New South Wales contains no specific provision dealing with this matter, except to say that a beneficiary is entitled to such accumulated income to which, under the general law, he would otherwise be entitled.[89] The Queensland and South Australia trustee legislation, on the other hand, expressly authorizes trustees to continue discretionary maintenance payments until the specified age or event occurs.[90]

As to the entitlement to accumulated income, Queensland, Victoria, Western Australia, and New Zealand adopt the English requirement that an infant with a vested interest must attain majority or marry under that age before he is entitled to accumulations; otherwise the accumulations form an accretion to the capital.[91] The New South Wales trustee legislation dispenses with this requirement and permits the infant to take the income to which he is entitled under the general law, whether or not it is in the form of accumulations.[92] The South Australia Act, on the other hand, provides that all accumulations not otherwise expended on maintenance by the trustees shall pass as an accretion to the corpus of the property from which the accumulations arose.[93]

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[85] See, generally, Meagher and Gummow, *Jacobs' Law of Trusts in Australia* (4th ed., 1977), at 466-74, and Kelly (ed.), *Garrow and Kelly's Law of Trusts and Trustees* (5th ed., 1982), at 367-79.

[86] Queensland *Trusts Act 1973*, *supra*, note 83, s. 61; South Australia *Trustee Act, 1936-1974*, *supra*, note 83, s. 33(1)(c)(i); Victoria *Trustee Act 1958*, *supra*, note 83, s. 37(1)(*a*); Western Australia *Trustees Act, 1962*, *supra*, note 83, s. 58(1)(*a*); and New Zealand *Trustee Act 1956*, *supra*, note 82, s. 40(1)(a).

[87] Queensland *Trusts Act 1973*, *supra*, note 83, s. 61; Western Australia *Trustees Act, 1962*, *supra*, note 83, s. 58(1)(*a*); and New Zealand *Trustee Act 1956*, *supra*, note 82, s. 40(1)(a).

[88] Victoria *Trustee Act 1958*, *supra*, note 83, s. 37(1)(*b*); Western Australia *Trustees Act, 1962*, *supra*, note 83, s. 58(1)(*b*); and New Zealand *Trustee Act 1956*, *supra*, note 82, s. 40(1)(b).

[89] New South Wales *Trustee Act, 1925*, *supra*, note 83, s. 43(b).

[90] Queensland *Trusts Act 1973*, *supra*, note 83, s. 61(3), and South Australia *Trustee Act, 1936-1974*, *supra*, note 83, s. 33(1)(c)(i).

[91] Queensland *Trusts Act 1973*, *supra*, note 83, s. 61(2); Victoria *Trustee Act 1958*, *supra*, note 83, s. 37(2)(*a*); Western Australia *Trustees Act, 1962*, *supra*, note 83, s. 58(2)(*a*); and New Zealand *Trustee Act 1956*, *supra*, note 82, s. 40(2)(a).

[92] New South Wales *Trustee Act, 1925*, *supra*, note 83, s. 43(5) and (6).

It will also be remembered that section 31 of the English *Trustee Act, 1925* contains the requirement that a contingent interest must carry the intermediate income at common law before maintenance payments can be made under the section. Two jurisdictions, New South Wales and South Australia, have departed from this approach and provide that, where the intermediate income is not carried under the common law, the future or contingent interest shall be deemed to carry that income, unless the income is "expressly or specifically" disposed of.[94] The legislation further provides that it is not so disposed of if it passes in default to a residuary or general legatee or devisee, reverts to the estate in resulting trust, or passes on an intestacy.[95]

Finally, the trustee legislation of Queensland, Western Australia, and New Zealand authorizes trustees, when exercising the statutory power of maintenance, to impose upon the person receiving the payment any condition, whether as to repayment, payment of interest, giving security, or otherwise, although the Acts also provide that the trustees may, at a subsequent date, waive the condition or release any obligation undertaken.[96] The legislation stipulates, however, that a trustee is not liable for any loss that may be incurred in respect of any money that is paid under the statutory power, whether the loss arises through failure to take security, through the security being insufficient, through failure to take action for its protection, through the release or abandonment of the security without payment, or from any other cause.[97]

(d) CONCLUSIONS

The Commission appreciates that, as express powers of maintenance are so familiar in trust instruments in Ontario, the introduction of a statutory power may appear unnecessary. We have also taken note that Ontario practitioners are accustomed to applying to the courts for orders authorizing the expenditure of funds for maintenance, and that existing law and practice in this area are considered to be quite adequate. The logic of this assessment is that nothing need or should be changed in the law of the Province regarding the availability of minors' funds for their maintenance. Nonetheless, we are of the view that two areas – the functioning of express maintenance powers contained in trust instruments and the role of the court – merit closer scrutiny.

As we have mentioned, it is common practice today for testamentary and *inter vivos* trusts to include an express power of maintenance that is comprehensive with respect to the property that can be used for this purpose and the objects for which trustees may make payments. Nonetheless, there are several inadequacies that can typically adhere to express powers of maintenance, which, in our opinion, could be eliminated by a statutory power in the revised Act.

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[93] South Australia *Trustee Act, 1936-1974*, *supra*, note 83, s. 33(5) and (6).

[94] New South Wales *Trustee Act, 1925*, *supra*, note 83, s. 43(3), and South Australia *Trustee Act, 1936-1974*, *supra*, note 83, s. 33(3).

[95] *Ibid.*

[96] Queensland *Trusts Act 1973*, *supra*, note 83, s. 63; Western Australia *Trustees Act, 1962*, *supra*, note 83, s. 60; and New Zealand *Trustee Act 1956*, *supra*, note 82, s. 41A.

[97] *Ibid.*

It has proved important that the objects of the power of maintenance be comprehensive. Today, provisions for "proper support and maintenance"[98] and "maintenance and education" are sometimes too narrow. "Benefit" is a word that should be included, as it is neutral in description and incorporates objects that the testator or settlor would no doubt favour, but may not have foreseen in advance, such as tax saving.[99] A second fault that an express power of maintenance may have is that it may be interwoven with the gifts that are made. A home-drawn will, for example, may leave assets to the widow "for the use and benefit of herself and the younger children".[100] This limitation is not only confused as to what interests are created; it is not clear whether the widow is a trustee at all. A power of maintenance assumes the existence of a trustee with such a power.

An additional source of ambiguity concerns what the donor intends when the person for whom maintenance is sought is a minor with a living parent. The parent has a legal duty to support the minor. Did the donor intend this to be irrelevant, or did he intend maintenance to cover those items that are beyond the means of the parent to supply? Moreover, the minor may have an independent income, or another fund may be available for his maintenance. In such a case, may the trustees disregard the existence of this fund? The specification of these matters is of some importance, especially if the beneficiary's interest is contingent only, or, even if it is vested, is subject to partial or total defeasance.

Maintenance is a benefit that the courts usually associate with minors.[101] A person who is married, or living an independent life apart from his parents, is more difficult to associate with maintenance, even if he has not yet attained majority. There is no rule of law restricting the meaning of maintenance in this way, and, although the courts have allowed maintenance for persons who are over the age of majority,[102] the cases are far fewer than those concerned with minority; it is harder to convince the courts that over-age maintenance was what the testator or settlor intended. The language of the power must make the intention clear.

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[98] "Support" and "maintenance" may have the same meaning, namely, the provision of food, clothing, and housing: see *Cook* v. *Noble*, *supra*, note 4.

[99] *Pilkington* v. *I.R.C.*, [1964] A.C. 612, [1962] 3 All E.R. 622 (H.L.). See, also, *In re Nanton Estate*, [1948] 2 W.W.R. 113 (Man. K.B.), and *Re Larsen* (1969), 1 D.L.R. (3d) 244 (B.C.S.C.).

[100] See, for example, *Barclay* v. *Zavitz* (1885), 8 O.R. 663 (H.C.J.); *Donald* v. *Donald* (1885), 7 O.R. 669 (H.C.J.); and *Coy* v. *Coy* (1887), 25 Gr. 267. See, also, *Bouck* v. *M.N.R.*, [1952] 6 D.T.C. 1090 (S.C.C.), considering and distinguishing *Singer* v. *Singer* (1916), 52 S.C.R. 447.

[101] See *MacDonald* v. *McLennan* (1885), 8 O.R. 176 (H.C.J.). In *Cook* v. *Noble*, *supra*, note 4, at 90, Proudfoot J. refused to follow Hall V.-C.'s decision in *Wilkins* v. *Jodrell* (1879), 13 Ch. D. 564, that maintenance and education extend to the whole of life. In *Singer* v. *Singer*, *supra*, note 100, at 461, Anglin J. expressly approved of *Cook* v. *Noble*, "whatever may be the view now prevailing in England". See, also, *Re Schellenberger Estate* (1910), 16 O.W.R. 268, *per* Middleton J.

[102] See *Re Wright*, *supra*, note 34, and *Re McCallum*, *supra*, note 34.

There is also the problem of whether the accumulated income of past years may be used for current maintenance needs, when current income has been exhausted. If accumulated income is otherwise to be added to and become capital, the testator or settlor may have intended that it should be capital for all purposes, or capital so far as it is not needed for maintenance during the period prior to vesting in possession or, in the case of a contingent interest, of vesting in interest and in possession.

Finally, there is the question whether the trustees may exercise the power of maintenance by setting up a new trust for the beneficiary, and paying the moneys for maintenance, education, or benefit to the new trustees to hold on the terms of that new trust. In the circumstances, for instance, when the beneficiary is living far away from the place of administration of the head trust, or taxation factors make it a wise course, a separate trust for maintenance may be something that the head trustees may properly wish to do. In *Re Rutherford*,[103] however, Ferguson J. was of the view that this could not be done. Any handing over of the fund, especially if it was the entire fund, was incompatible with the discretion that the head trustees must exercise.

Regarding the role of the court in authorizing maintenance payments, either pursuant to its inherent jurisdiction or under its statutory jurisdiction contained in the *Children's Law Reform Act* or in section 36 of the *Trustee Act* and the Rules of Practice, the function of the Official Guardian is an important one in this area. All payments out of court are reviewed by the Official Guardian. It may be argued that, if maintenance payments were to be made more extensively by trustees under a statutory power for those trusts where there are inadequate or non-existent express powers, the courts and the Official Guardian would have proportionately less control over such payments than they have now. It has also to be remembered that the courts will not interfere with a trustee's exercise of discretion, unless the trustee has acted in bad faith. The decision of trustees who make payments under a statutory power of maintenance can only be challenged if it can be shown that no reasonable person could have come to such decisions.[104]

On the other hand, we cannot appreciate the commendation of a system that only subjects to the scrutiny of the court those payments that are to be made from trust funds that have been paid into court, or where the trust instrument does not contain an express power, or where the power proves inadequate. Such silence or inadequacy in the trust terms is probably the outcome of mere accident or ignorance. Settlors and testators who are well advised, however large or small the fund in question, will equip their trustees with such powers that the trustees will neither need nor concern themselves with court approval. It is not so much a matter of the ease or difficulty of acquiring court orders authorizing payment. There are still cost and delay factors that only fall upon trustees who, by mischance, must apply to the court for maintenance payment approval. A more consistent approach to the role of the court would be to require that all payments for maintenance should receive the approval of the court – the Official Guardian present to ensure that the best interests of the minor are preserved – and to advise testators and settlors to subject their trustees to judicial supervision by excluding deliberately all powers of maintenance from the trust instrument. No one has suggested to us, however, that all payments from any trust that is subject to the jurisdiction of the Ontario courts should receive the pre-consent of the court; nor has anyone been prepared to defend this position.

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[103] *Re Rutherford*, [1961] O.R. 108 (H.C.J.).

[104] *Gisborne v. Gisborne* (1877), 2 A.C. 300 (H.L.).

In considering the need for an express statutory power of maintenance, the Commission has taken note of the comment that the present limited statutory jurisdiction of the court under section 36(6) of the *Trustee Act*, which concerns money paid into court, and the ability of the Official Guardian to apply on behalf of minors under Rule 741 of the Ontario Rules of Practice, is satisfactory, as evidenced by the fact that the inherent jurisdiction of the court to award maintenance is not often invoked. Most lawyers tend to think of maintenance in connection with the person who is a minor and who has a vested absolute interest.[105] The only issue in such cases, where money is paid into court, is whether the purpose of the payment and the size of the available fund justify the payment. There can hardly be said to be a legal issue involved, other than perhaps the purposes for which payments may be made.

But legal issues may well arise on applications for maintenance payments that are not addressed by the limited statutory provisions. These issues may concern whether the interest in question carries the intermediate income, whether any income is available for the maintenance of a person whose life interest has not yet vested in possession, whether accumulated income can be drawn upon to pay for past maintenance, or other questions of the kind that we have mentioned previously. Many of the legal issues remain unsettled in case law; *Watson v. Conant*[106] has gone some way to deciding the question of which interests carry the intermediate income, but many questions remain. Today, since a number of Commonwealth jurisdictions possess a statutory maintenance power, future developments of case law in this area from outside the Province are unlikely.

So far as the tax implications of a statutory power of maintenance are concerned, it is evident that the importation of a statutory power of maintenance in a trust might taint a spousal trust under the terms of the *Income Tax Act* (Canada).[107] A spousal trust under the *Income Tax Act* (Canada) must be exclusively for the benefit of the spouse of the settlor or testator, and no other person must have an actual or possible interest in the trust property while the spousal trust is in effect. However, it is difficult to see how tainting could occur with a power to pay income. The spouse will either have the income interest (or life estate) herself, or property will be held on trust for her absolutely, in which case she would take all the income. The essence of a power to pay income to a person whose interest is vested but subject to postponed possession, or contingent, is that the interest must carry the income arising before the vesting in possession occurs. For that situation to happen the intermediate income cannot have been given by the instrument to another, namely, someone other than the spouse.

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[105] Section 36(6) of the Ontario *Trustee Act* enables a "person" with money payable to an infant to pay it into court. It is "payable" where the infant is "entitled" to the money. These powers are designed for moneys, and essentially for moneys in which the minor has an absolute interest.

[106] *Supra*, note 31.

[107] *Supra*, note 12, ss. 70(6), 73, 74, and 104(4)(*a*).

Having considered the arguments carefully, we have concluded that a good case can be made for a statutory power of maintenance, that is, a power to apply income[108] to satisfy various needs of a beneficiary. First, if a statutory power of maintenance were available, the beneficiaries' trust funds would not be put to the cost and delay of applications to the court where trust instruments do not contain an express power of maintenance, or contain an inadequate power. Secondly, constructional problems are less likely to arise where use of a standard form of maintenance is available. Thirdly, if desired by the settlor or testator, the statutory power could be easily modified by the instrument. Fourthly, to the extent that this is considered important, trust instruments would be shortened in length while possessing a comprehensive power, that is, a power that covers all kinds of interest and deals with each of the problems associated with the common law power of maintenance.

The next question for consideration is the type of maintenance power that the revised Act should contain. In this regard, the Commission has reviewed the following three alternatives: first, the adoption, without modification, of section 31 of the English *Trustee Act, 1925*; secondly, the adoption of the English provision, but modified in certain respects, as has been done in several jurisdictions in Australia and in New Zealand; and thirdly, the incorporation of an entirely new power of maintenance.

Initially, our first choice for reform was the third of these alternatives. This approach would permit, so far as possible, the introduction of a simpler power than that contained in the English and Australian legislation, and more akin to the type of power in use in Ontario today. However, it became evident that, if a statutory power is to be introduced, it must provide a solution to the range of possible questions that might arise. We could not think in terms of minors' interests only, nor assume that interests that are not fully vested depend upon events that will occur on or before the attainment of majority. Testators often choose to postpone gifts to the attainment of ages as great as thirty years; twenty-one and twenty-five years are particularly popular. Indeed, the lowering of the age of majority to eighteen has actually encouraged testators to think in terms of greater ages. Such gifts may be contingent or vested with deferred possession, the vesting may be defeasible or determinable upon the occurrence or non-occurrence of the chosen event, and the property in question may be intended ultimately to be taken absolutely or only for some limited interest, such as a life tenancy.

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[108] Although the phrase "power of maintenance" refers traditionally to a power to apply income and, in some cases, capital to the immediate needs of a beneficiary, the Commission is using the phrase in a non-technical sense to mean the application of income only for special purposes to be dealt with *infra*, this sec.

It is, of course, arguable that any trust involving other than a vested absolute interest, held by trustees pending the attainment of his majority by a beneficiary under eighteen years, is more than likely to have been drawn by a lawyer, who will, in all likelihood, have introduced an express power of maintenance. But, if we considered that there was a persuasive case for a statutory power, could we choose to ignore gifts that depend upon post-majority events, gifts that are other than simple in character, and powers that, although express, do not deal with such problems as the duty of a parent to support, the availability of another fund that can be used for maintenance, who is to take accumulated income, and the availability of such income to pay for maintenance? Accordingly, it seemed evident that we were working back to the type of comprehensive power that the English legislators in 1925 thought necessary in light of their experience with the less comprehensive statutory models of 1860 and 1881.

We have, therefore, concluded that the second of the above alternatives is the better approach, and recommend that the revised Act should contain an express power of maintenance based on section 31 of the English *Trustee Act, 1925*. But, while we find the comprehensiveness of the English power admirable, we are also of the view that it has been less than successful with respect to certain crucial questions, such as which interests carry the intermediate income. Moreover, the English provision is too tied to the social patterns of a former era in thinking of maintenance exclusively in terms of minors. For these and associated reasons, we concluded, and accordingly recommend, that the Ontario version of section 31 of the English *Trustee Act, 1925* should be modified in certain respects as has been done in several Commonwealth jurisdictions.[109] In this respect, we have turned to the amendments adopted by New Zealand and by some of the jurisdictions in Australia, and have examined these to determine what improvements might be made to the English provision.

The scheme that we propose is based upon the English provision that all interests of whatever nature – that is, whether the property interest is vested or contingent – should be made eligible for maintenance payments, unless the testator or settlor has expressly provided otherwise, and we so recommend.[110] However, we are of the view that the scope of the terms "vested" and "contingent" should be clarified in the revised *Trustee Act*.

As we mentioned in our introduction to this chapter, the term "vest" comprehends not only an interest in which a person has a present right of enjoyment, but also interests that may be postponed as to possession, and interests that are defeasible, either in whole or in part, or determinable. To ensure that all types of vested interest are included within the statutory provision, we are of the opinion that the revised *Trustee Act* should stipulate that a vested interest includes an interest that is vested absolutely, defeasibly, whether in whole or in part, determinably, or deferred as to possession, and we so recommend.[111]

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[109] Draft Bill, ss. 45-48.

[110] *Ibid.*, s. 45(1).

[111] *Ibid.*, s. 44(1).

It will be recalled that, under the present law in Ontario, the contingent interest of a minor must carry the intermediate income at common law before maintenance payments to the minor from that interest will be authorized.[112] This position has been carried over to section 31 of the English *Trustee Act, 1925*,[113] and also appears in the trustee legislation of New Zealand, Victoria, Western Australia, and Queensland.[114] However, whether or not a particular contingent interest may be said to carry the intermediate income is, as we have noted previously,[115] often difficult to determine, and, in addition to the uncertainty created, the fine distinctions that are made may often lead to arbitrary results. We are therefore attracted to the approach adopted by New South Wales[116] and South Australia;[117] namely, that, where the intermediate income is not carried under the common law, the future or contingent interest shall be deemed to carry that income, unless the income is expressly or specifically disposed of. Accordingly, we recommend that the revised *Trustee Act* should provide expressly that, notwithstanding the terms of the trust instrument and except so far as such income or a part of it is expressly disposed of otherwise, all vested and contingent interests, whether arising by will or otherwise, and whatever the nature of the property subject to them, should carry the intermediate income from the date the interest arises.[118]

As with the English provision, we are of the opinion and recommend that, during the minority of any person with a vested or contingent interest, the trustees should be able, in their sole discretion,[119] but subject to any interests or charges affecting the property in question, to pay to the parent or guardian or to the person having custody or control, or otherwise apply for or towards the maintenance, education, or benefit of the minor, the whole or such part of the income of that property as may, in the circumstances, be reasonable.[120]

In addition, like the majority of Commonwealth statutory precedents, we recommend that the proposed statutory power of maintenance should be exercisable whether or not there is any other fund applicable to the same purpose or whether any person is bound by law to provide for his maintenance or education.[121] Moreover, we note that, in addition to authorizing payments for maintenance, education, and benefit, testators and settlors today are willing to see income, and not just capital, expended for "advancement" purposes as well. As we have seen, this view has been statutorily adopted by the trustee legislation of Alberta, the majority of the Australian states, and New Zealand.[122] Accordingly, we also recommend that income should be available for purposes related to advancement in life.[123]

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[112] See *supra*, this ch., sec. 2(a).

[113] See *supra*, this ch., sec. 2(b).

[114] See *supra*, this ch., sec. 2(c)(ii).

[115] See *supra*, this ch., sec. 2(a).

[116] New South Wales *Trustee Act, 1925*, *supra*, note 83, s. 43(3).

[117] South Australia *Trustee Act, 1936-1974*, *supra*, note 83, s. 33(3).

[118] Draft Bill, s. 47(1).

[119] We also recommend that it should not be relevant to the discretionary exercise of the statutory power of maintenance that the minor's interest may ultimately prove to be invalid under the Ontario *Perpetuities Act*, R.S.O. 1980, c. 374: see Draft Bill, s. 45(1).

[120] Draft Bill, s. 45(1)(*a*).

[121] *Ibid.*, s. 45(1)(*a*)(i) and (ii).

With respect to the position of a beneficiary whose interest remains contingent after he attains majority, it will be recalled that section 31 of the English Act provides that such person shall receive the annual income from his interest as it arises.[124] Although Victoria, Western Australia, and New Zealand have also adopted this approach,[125] we are of the opinion that the position taken by the Alberta, Queensland, and South Australia trustee legislation is preferable; namely, that trustees are authorized to continue discretionary income payments until the specified age or event occurs.[126] Presumably, the testator or settlor had a specific reason for stipulating a later event for vesting or full vesting, and, accordingly, we are of the view that it would be inconsistent with this intention to permit the beneficiary to have the benefit of the full income prior to the occurrence of the contemplated event.

Moreover, a power that would, in effect, permit the trustees to hold the property on a discretionary trust would allow trustees to continue to meet the legitimate needs of the beneficiary and for broader purposes than would be associated with minority. Accordingly, we recommend that the revised *Trustee Act* should contain a provision to the effect that, in the case of any person who has attained the age of eighteen years and does not have an income or capital interest vested in interest and in possession, the trustees may, until he either attains such an interest or dies, or until failure of his interest, pay to that person for his benefit the whole or any part of the income as they in their sole discretion think fit, whether or not there is any other fund available for payments to him.[127]

An area of uncertainty for trustees, where the vesting of an interest is delayed until well after a beneficiary attains majority, is whether maintenance payments for the benefit of that beneficiary may also be applied for the benefit of his spouse and children. In England, trustees are permitted to make such payments by creating sub-trusts in the furtherance of their power to "benefit" the beneficiary.[128] In Ontario, the ability of trustees to use a power of maintenance to create sub-trusts that would more effectively carry out the testator's purpose, for example, to benefit the wife and children of his adult son beneficiary, is in considerable doubt.[129] We are of the opinion that trustees should have this power where adult beneficiaries are involved; but rather than structuring the power exclusively in the form of a sub-trust for a spouse or child of the adult beneficiary, we have concluded that trustees should also be permitted to make direct payments, if they consider the circumstances to be appropriate. Accordingly, we recommend that the revised *Trustee Act* should provide that, where a person who under our previous recommendations would be entitled to receive discretionary income payments is or has been married, the trustees may exercise their discretionary power to pay that income, by way of sub-trust or otherwise, in favour of the existing or former husband or wife or the children of the person so qualified, including the children of a former marriage, where in the sole discretion of the trustees they consider the circumstances appropriate and to the benefit of the person so qualified.[130]

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[122] See *supra*, this ch., sec. 2(c).

[123] Draft Bill, s. 45(1)(*a*).

[124] See *supra*, this ch., sec. 2(b).

[125] See *supra*, note 88.

[126] See *supra*, notes 77 and 90.

[127] Draft Bill, s. 45(1)(*b*).

[128] See *Roper-Curzon v. Roper-Curzon* (1871), L.R. 11 Eq. 452, and *Re Halsted's Will Trusts*, [1937] 2 All E.R. 570 (Ch. D.).

[129] *Re Rutherford*, *supra*, note 103.

It will be recalled that section 31(2) of the English *Trustee Act, 1925* deals with accumulated income and provides that an infant with a vested interest is only entitled to the accumulations if he attains majority or marries under that age; otherwise the accumulations are an accretion to the capital of the property.[131] We are of the opinion that the revised Act should contain a provision dealing with accumulated income similar to section 31(2) of the English *Trustee Act, 1925*, but that several changes should be made. First, we recommend that excess income accumulated prior to the vesting of the interest in interest and in possession should be payable to the beneficiary at majority or the vesting in interest and in possession, whichever is later.[132] This position is consistent with our view that the deferral of vesting past majority was intended by the creator of the trust for a specific reason, and that to permit payment of income for other than the needs of the beneficiary prior to vesting would be contrary to this reason, whatever it be.

Secondly, unlike the English position and more akin to the Alberta amendment,[133] we are of the opinion, and accordingly recommend, that a beneficiary with a vested interest who dies in infancy, or an adult beneficiary with a vested interest who dies prior to the vesting in possession, should be entitled to receive the accumulated excess income.[134] While this result would follow under the common law, we wish to make it clear that this provision should not be viewed as entitling a person who has an interest in capital vested in interest to call for the capital or the accumulations during his lifetime other than at the close of his minority or when his interest vests in possession, whichever occurs last, and we so recommend.[135] We further recommend that, for all purposes where a contingent interest is involved, and where the beneficiary dies or the interest fails before the contingency occurs, accumulations should accrue to capital.[136]

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[130] Draft Bill, s. 45(2). For a definition of "subtrust", see Draft Bill, s. 44(4).

[131] See *supra*, this ch., sec. 2(b).

[132] Draft Bill, s. 46(1).

[133] See *supra*, notes 74 and 75.

[134] Draft Bill, s. 46(2).

[135] *Ibid*.

[136] *Ibid*., s. 46(3). It might be thought that, if an interest is vested but is defeasible or determinable, the testator should not be assumed (that is, subject to provision to the contrary) to have intended that income in excess of maintenance needs, and therefore accumulated, should become the property of that beneficiary, whether or not the defeasance or determinability occurs. It may also be thought that too narrow a construction

As with the English provision, we recommend that, during the minority of the beneficiary or during such further time as under our recommendations maintenance may be paid, trustees should be able to pay or apply the accumulated income or any part of it as if the accumulations were income arising in that current year.[137] Moreover, like the provisions contained in the Queensland, Western Australia, and New Zealand Acts,[138] we recommend that trustees should be empowered to pay or apply income or accumulations for the past maintenance, education, advancement in life, or benefit of the person who is a minor, and to pay accumulations as they think fit for the benefit of a beneficiary who has attained majority but whose interest does not vest in interest or in possession until after majority, or to the existing or former spouse or the children of that beneficiary.[139]

Finally, we recommend that, if a trust would, but for the proposed statutory power of maintenance, constitute a spousal trust under the terms of the *Income Tax Act* (Canada), the statutory power of maintenance should only apply if the instrument so provides.[140] In other respects, we are of the view that the proposed statutory maintenance provisions should have effect unless a contrary intention is expressed in the trust instrument.[141] However, given the nature of the changes effected by our proposed statutory power of maintenance, and, in particular, with respect to those interests that will be deemed to carry the intermediate income, we recommend that it should only apply where the trust instrument under which the interest arises takes effect after the revised Act has come into force.[142]

3. POWER OF ADVANCEMENT

(a) Ontario

As with the power of maintenance, the Ontario *Trustee Act* does not contain an express provision dealing with the power of advancement. Trustees must rely, therefore, upon express powers of advancement contained in the trust instrument, or upon the inherent jurisdiction of the court to authorize payments for the advancement in life of a beneficiary. We would note that section 36 of the Ontario *Trustee Act* and Rule 741 of the Ontario Rules of Practice can be utilized to effect a payment in and a lump sum payment out of court of a minor's interest, which could presumably be applied for advancement purposes.[143] Moreover, the realization of capital funds for advancement purposes from a sale of the property of a minor under the Ontario

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line separates vested but defeasible interests, and contingent interests. However, we have attempted to balance these considerations having simplicity and convenience of administration in mind.

[137] *Ibid.*, s. 46(5).

[138] See *supra*, note 87.

[139] Draft Bill, s. 46(6).

[140] *Ibid.*, s. 44(2).

[141] *Ibid.*, s. 2(*b*).

[142] *Ibid.*, s. 48.

[143] See *supra*, this ch., sec. 2(a).

Children's Law Reform Act may also be consented to by the court, whose jurisdiction, by that statute, extends to orders for the purposes of support or education, or where the disposition "will substantially benefit the child".[144]

With respect to the scope of the court's inherent jurisdiction in this area, as we mentioned earlier, while a power of maintenance traditionally refers to a power to pay income,[145] or to make payments out of accumulated income, to a trust beneficiary, the power of advancement refers to a power to make payments of capital; "advancement" in this sense means to set a person up in life. It is a payment of a lump sum that is not a regular or instalment payment, and it is not a casual payment.[146] For over a century, in the absence of an express power contained in the trust instrument, the court has been willing, under its inherent jurisdiction, to approve payments out of capital for minors and adults awaiting full vesting of their interest. However, because it is capital that is involved, the court has always required a very good case to be made by the person applying for such payment; for example, an application for the expenditure of capital upon the maintenance of a beneficiary has proved hard to justify.[147]

A more considerable difficulty, however, is that the court has no jurisdiction to approve the expenditure of capital where a beneficiary does not have an interest that is indefeasibly vested.[148] If the interest is contingent, or vested but defeasible or determinable on the occurrence or non-occurrence of a future event, any payment of capital may prove to be at the expense of the person who is entitled to the gift over. There have been English cases[149] where trustees have taken the risk that the future vesting or indefeasible vesting would occur and have made payments for advancement, and their accounts were ultimately passed. Nonetheless, there appears to be no Canadian precedent to the same effect, and without the consent of those who are to take the gift over,[150] it would seem that, under the inherent jurisdiction, the court can do nothing in these circumstances. Such a result is unfortunate, because, as we have previously remarked, it is evident that, where contingencies and defeasances are created, the majority of testators and settlors today have in mind only what shall happen to the gift if the young beneficiary were, for instance, to die.

(b) ENGLAND

In 1925, Parliament in England introduced a power of advancement in the *Trustee Act* of that year, and this was the first time a power to pay or apply capital to a beneficiary with a capital interest had appeared in English trustee legislation.[151] This power, which reflects the kind of power that was then familiar in well-drawn trust instruments, remains in force today. Section 32 of the English *Trustee Act, 1925* provides as follows:

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[144] *Children's Law Reform Act*, *supra*, note 19, s. 60(2).

[145] In exceptional circumstances, capital may be applied for the purposes of maintenance.

[146] See *In re Scott*, [1903] 1 Ch. 1 (C.A.). See, also, Keeton and Sheridan, *supra*, note 50, at 297.

[147] See *Edwards v. Durgen*, *supra*, note 26.

[148] See *Lee v. Brown* (1798), 4 Ves. Jun. 362, 31 E.R. 184, cited with approval in *In re Forster* (1910), 39 N.B.R. 526 (C.A.).

[149] See, for example, *Worthington v. M'Craer* (1856), 23 Beav. 81, 53 E.R. 32.

[150] Moreover, the persons whose consent would be required must be adult and capacitated.

> 32.—(1) Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion, and such payment or application may be made notwithstanding that the interest of such person is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the class to which he belongs:
>
> Provided that –
>
> (*a*) the money so paid or applied for the advancement or benefit of any person shall not exceed altogether in amount one-half of the presumptive or vested share or interest of that person in the trust property; and
>
> (*b*) if that person is or becomes absolutely and indefeasibly entitled to a share in the trust property the money so paid or applied shall be brought into account as part of such share; and
>
> (*c*) no such payment or application shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money paid or applied unless such person is in existence and of full age and consents in writing to such payment or application.
>
> (2) This section applies only where the trust property consists of money or securities or of property held upon trust for sale calling in and conversion, and such money or securities, or the proceeds of such sale calling in and conversion are not by statute or in equity considered as land, or applicable as capital money for the purposes of the Settled Land Act, 1925.
>
> (3) This section does not apply to trusts constituted or created before the commencement of this Act.

Accordingly, under this provision any person qualifies who has a capital interest, whether vested and absolute, vested but defeasible, wholly or partly, or determinable, or even contingent. Moreover, whether the beneficiary's interest is in possession, in remainder, or in reversion, it qualifies for the discretionary payment of capital advances.

Trustees may "pay or apply"[152] capital for the "advancement or benefit" of the qualified person, and it is provided that, if the beneficiary in question is or becomes absolutely and indefeasibly entitled to the capital by way of a shared interest, he must bring all advances into account when a division is being made. If the capital interest is subject to a prior "life or other interest, whether vested or contingent", no advance may be made, unless the person with the prior interest is in existence, of full age, and consents in writing to the payment or application.

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[151] *Supra*, note 45, s. 32. The English Law Reform Committee, in its *Twenty-third Report: The Powers and Duties of Trustees* (October, 1982) (hereinafter referred to as "English Law Reform Committee Report"), recommended, at para. 4.41, the retention of section 32.

[152] Trustees would "apply" when they make moneys available directly to a third party for the advancee's advancement or benefit, or they create a sub-trust of advanced moneys, the advancee being the beneficiary: see *Pilkington v. I.R.C.*, *supra*, note 99.

There is, however, one major restriction. No more than one-half of the capital to which a person is entitled, within the description given earlier, may be advanced. The power is also exercisable only where the trust property takes the form of personalty, actual or notional, under a trust for sale. The reason for this restriction is that it is essential that the power not interfere with provisions for the holding of capital moneys under the *Settled Land Act, 1925*.[153]

(c) OTHER JURISDICTIONS

(i) Canada

Only Manitoba[154] and Prince Edward Island[155] have adopted a statutory power of advancement. The remaining common law jurisdictions in Canada must rely, like Ontario, upon express powers of advancement contained in the trust instrument, or upon the inherent jurisdiction of the court.

Until 1968, the Manitoba *Trustee Act* contained a power of advancement, which, but for the necessity of court approval of a trustee's proposed exercise of the power, duplicated the English statutory provision. In that year, Manitoba amended its provision[156] by adding maintenance and education to advancement and benefit as approved purposes of capital expenditure. The English exception of settled land was not needed in the Manitoba context and the power was, therefore, made applicable to gifts of both realty and personalty. The requirement of court consent to a proposed trustee exercise of the power was retained, however, reflecting the view that caution must be exercised in the payment or application of a beneficiary's capital before vesting in possession has taken place.

In 1956, Prince Edward Island also adopted the English *Trustee Act, 1925* provision.[157] The Prince Edward Island version follows section 32 of the English Act even to the point that, unlike Manitoba, it does not require judicial consent to a proposed exercise of the power.[158] However, it is not clear whether trustees may sell, mortgage, or charge trust land for the purpose of advancing capital, an authority that might have been thought invaluable if trustees do not wish to sell realty. In Manitoba, this authority exists,[159] but trustees are not permitted to transfer land to a capital beneficiary. The latter is permitted in Prince Edward Island.[160]

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[153] *Settled Land Act, 1925*, 15 & 16 Geo. 5, c. 18 (U.K.).

[154] Manitoba *Trustee Act*, *supra*, note 69, s. 32.

[155] Prince Edward Island *Trustee Act*, *supra*, note 70, s. 40.

[156] *An Act to Amend The Trustee Act*, S.M. 1968, c. 70, s. 29C.

[157] *An Act to Amend The Trustee Act*, P.E.I. Acts 1956, c. 44, s. 31H.

[158] However, section 40(1)(d) of the Prince Edward Island Act contains a restriction that is not present in the English legislation: namely, that, if the settlor is acting as trustee of the trust, he is not permitted to make advancements of capital or to participate in the determination to make such a proposal.

Finally, it should be mentioned that in 1974 Alberta amended its *Trustee Act* to permit the payment or application of income for "advancement" purposes,[161] but, as stated, this legislation does not contain the authority to make capital payments for the advancement of a beneficiary.[162] It will be recalled that we have previously recommended that, under our proposed statutory power of maintenance, income should also be available for purposes related to advancement in life.[163]

(ii) Australia and New Zealand

New Zealand[164] and all the Australian states,[165] except Tasmania, have adopted the 1925 English statutory power, but, as with the English power of maintenance of that same year, several of those jurisdictions have introduced modifications to the power. New Zealand and the Australian states have done as Manitoba has done, and enable capital to be paid or applied for maintenance and education, as well as advancement and benefit, although New South Wales prohibits the use of capital for maintenance and education where the value of the capital interest in question is over a certain size.[166] New Zealand permits up to a specified amount to be paid where the value of the capital interest is below a fixed dollar figure, and imposes a limitation of one-half upon the amount that may be advanced where the value of the capital interest exceeds the stipulated figure.[167] Victoria also allows the sale, mortgage, or exchange of trust property in order to raise moneys to enable the trustees to make capital advances.[168]

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[159] Manitoba *Trustee Act*, *supra*, note 69, s. 32(4).

[160] Prince Edward Island *Trustee Act*, *supra*, note 70, s. 40(1).

[161] Alberta *Trustee Act*, *supra*, note 61, s. 34(1).

[162] Like s. 60(1) and (2) of the Ontario *Children's Law Reform Act*, *supra*, note 19, the trustee legislation of Alberta, Saskatchewan, British Columbia, the Yukon, and Northwest Territories permits trustees, by order of the court, to sell and dispose of any realty or personalty of an infant; presumably, the proceeds of sale could be applied for advancement purposes: see *supra*, this ch., sec. 2(c)(i).

[163] Draft Bill, s. 45(1)(*a*). See *supra*, this ch., sec. 2(d).

[164] New Zealand *Trustee Act 1956*, *supra*, note 82, s. 41.

[165] New South Wales *Trustee Act, 1925*, *supra*, note 83, s. 44; Victoria *Trustee Act 1958*, *supra*, note 83, s. 38; Western Australia *Trustees Act, 1962*, *supra*, note 83, s. 59; Queensland *Trusts Act 1973*, *supra*, note 83, s. 62; and South Australia *Trustee Act, 1936-1974*, *supra*, note 83, s. 33a.

[166] New South Wales *Trustee Act, 1925*, *supra*, note 83, s. 44(1A). The value of the infant's capital interest must not exceed $A.4,000. Presumably, this is done on the basis that a greater capital interest should produce sufficient income to provide for maintenance and educational needs.

[167] New Zealand *Trustee Act 1956*, *supra*, note 82, s. 41(a). Where the value of the infant's interest exceeds $N.Z.15,000, only one-half of that interest may be advanced, and in any other case, the advance must not exceed $N.Z.7,500 in amount or value.

Perhaps the most interesting modification, however, is one that was first introduced by New Zealand,[169] and that has been followed subsequently by Western Australia[170] and Queensland;[171] that is, the authority conferred upon trustees to impose conditions on the person receiving the advance of capital.[172] The person advanced may be required to repay, pay interest, give security, or do anything that seems appropriate to the trustees. The trustees may subsequently waive any condition. If any moneys are repaid or any asset re-transferred to the trustees, the amount or value is considered not to have been advanced, a provision that is important where there is a ceiling amount that may be advanced to any beneficiary. The trustees are not responsible for the conduct of any beneficiary who fails to make adequate security arrangements, provided, presumably, that the trustees are not negligent or do not act in bad faith.[173]

(d) CONCLUSIONS

The arguments advanced for no change in this area of the law in Ontario are similar to those that we examined in relation to the power of maintenance. The arguments for a statutory power of maintenance are also equally applicable with respect to a power of advancement. On the basis of those arguments, the Commission has formed the opinion that, given the familiarity in well-drawn trust instruments of a power to pay capital, a power of advancement should be introduced in the revised *Trustee Act*. As with an express power of maintenance, the drafting of a power of advancement presents particular difficulties, which are worthy of note at this juncture.

The term "advancement" is, in fact, an antiquated word, reminiscent of the eighteenth century, and conceived at a time when only upper income groups of society, who had a particular pattern of life, would be trust beneficiaries. Aside from the ambiguity of the word,[174] its meaning for present purposes is best reflected where it is found in the company of "maintenance", "education", and "benefit". Indeed, today, express powers to pay capital are not usually restricted to "advancement", if they are professionally drawn. "Benefit" will be included, and we have observed that this neutral word can embrace a limitless number of purposes.[175] Nevertheless, if the power of advancement is restricted to a specific end that the testator had in mind, for instance, "to start him in any business or employment", the power will not be available for another purpose, such as making a down payment on a house for the beneficiary. There could also be a question whether "employment" means occupation or salaried position, and whether fees or dues payable are within "business or employment". Middleton J. said of the word "advancement" that it has a well-recognized, but "narrow and restricted", meaning: "some occasion out of the everyday course, when the beneficiary has in mind some new act or undertaking which calls for pecuniary outlay, and which, if properly conducted, holds out a prospect of something beyond a mere transient benefit or employment".[176]

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[168] Victoria *Trustee Act 1958*, *supra*, note 83, s. 38(6).

[169] New Zealand *Trustee Act 1956*, *supra*, note 82, s. 41A, first introduced by the *Trustee Amendment Act 1960*, Stat. N.Z. 1960, No. 101, s. 7.

[170] Western Australia *Trustees Act, 1962*, *supra*, note 83, s. 60.

[171] Queensland *Trusts Act 1973*, *supra*, note 83, s. 63.

[172] The authority for trustees to impose conditions also applies where trustees pay or apply income for maintenance, education, advancement or benefit of a beneficiary: see *supra*, this ch., sec. 2(c)(ii).

[173] See *In re Pauling's Settlement Trusts*, [1964] Ch. 303, [1963] 3 All E.R. 1 (C.A.), where the availability of such a statutory power might have prevented a considerable loss of sums advanced, and consequent liability of the trustees.

[174] See *Re Cross Estate* (1965), 51 W.W.R. 377 (B.C.S.C. *in banco*).

Nor has the issue of debt payment on behalf of a beneficiary out of his capital interest been settled by the courts. On the one hand, it appears as a mere relief for the person so advanced from the pressure of his immediate creditor or creditors, a relief that may be sought periodically . Yet, on the other hand, freeing a young person of debt as he enters upon marriage or a career may well be a form of advancement intended by a testator or settlor today.[177]

An express power of advancement contained in a trust instrument should always be specific about persons whose interests are contingent, defeasible, or determinable, or, if such interests are also created by the instrument, in remainder or reversion. It should be clear when the power is exercisable. If there is a preceding income interest, and the capital interest in remainder is vested in a minor when the instrument takes effect, the power of advancement should state whether it may be exercised only if the income interest terminates while the remainderman is a minor. The trust instrument should be explicit whether, with or without the consent of the income beneficiary, capital may be advanced to the remainderman during the income beneficiary's lifetime.[178]

Finally, although not always appreciated, unless the testator or settlor requires any payment or application on account of advancement to be brought into account when a division of capital comes to be made between a class of capital beneficiaries, no account has to be taken of the advancement. This is well established in English and Canadian law.[179] Indeed, even where there is an ordinary hotchpot clause in a will, it does not apply to payments or applications by way of advancement.[180] If thought has not been given to this factor, resentment may arise among capital beneficiaries in the class who have not received the benefit of advancements.

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[175] See, further, Waters, "The 'New' Power of Advancement" (1958), 22 Conveyancer (N.S.) 413, and *Hospital for Sick Children v. Chute* (1902), 3 O.L.R. 590 (C.A.).

[176] *Brooke v. Brooke* (1911), 3 O.W.N. 52 (H.C.J.), at 54.

[177] See *In re Scott*, *supra*, note 146, and *Re Hall* (1887), 14 O.R. 557 (H.C.J.), at 559.

[178] See *In re Finlayson* (1897), 5 B.C.L.R. 517.

[179] See Baker and Langan (ed.), *Snell's Principles of Equity* (28th ed., 1982), at 277-78.

[180] See *Re Cross Estate*, *supra*, note 174. A "hotchpot" provision is a clause in an instrument requiring a beneficiary who has received a special or appointed share to add his special share to the fund before it is distributed among a class of beneficiaries and before that beneficiary can share further in the fund to be distributed.

It would be part of the function of a statutory power of advancement to ensure that all these issues have been dealt with adequately.

Two considerations, peculiar to the power to advance capital to a beneficiary, have given us pause. First, there is the question whether capital should be payable to or for persons who, at the time of payment, do not have absolute vested interests. There will always be persons who are entitled to the property in question if the condition of a contingent interest is not satisfied, and persons entitled if a vested interest, which is defeasible or determinable, is prevented from becoming absolute by the occurrence of the defeasance or determinability. There is no reason why a testator or settlor should not expressly authorize trustees to pay capital to or for a beneficiary whose interest is still contingent, defeasible, or determinable. But should the legislature make an assumption that the creator of the trust intends payments of capital to be made in such circumstances, which the testator or settlor must then exclude? If the contingency, the defeasance, or determinability must occur, if at all, shortly after the instrument takes effect, few payments will likely have been made before it is known whether the interest is or is not to become absolute. But, if the contemplated event may occur, or not occur, years after the trust instrument has taken effect, it is evident that a significant amount of the capital could have been paid out by the time it is known whether the beneficiary's interest is to continue, or, if contingent, whether it is to vest at all.

It could be for this reason that, of the Canadian common law jurisdictions, only Manitoba and Prince Edward Island have adopted in their trustee legislation a power of advancement, and why Manitoba has added the requirement to its power that the consent of the court must be obtained before any capital can be paid or applied under the power.[181]

The second consideration that has concerned us arises from the broader number of purposes for which payments of capital appear to be authorized in many trust instruments today. Purposes such as "maintenance, education, advancement, or benefit" are common, not only in express clauses, but also in the Australian and New Zealand statutory powers of maintenance and advancement.[182] But, even though England had a distinct notion of maintenance and of advancement in 1925, the addition of the word "benefit", which appears in both the 1925 powers of maintenance and advancement, has since proved to be a word of very wide import. For example, in *Pilkington v. I.R.C.*[183] the House of Lords held that "benefits" embraced the payment of a very considerable capital sum for the benefit of a three-month old child, the object of the release of the funds from the trust being to avoid a significant estate duty liability that might otherwise arise. In effect, therefore, "maintenance" no longer describes the scope of the power to pay income or accumulated income, if "benefit" is also a permissible object. With "benefit" added, "advancement" no longer describes the scope of the power to pay capital. If *Pilkington v. I.R.C.* were to be followed in Ontario, the so-called powers of maintenance and advancement would, in fact, be discretionary powers of the trustees to pay out income and capital for such purposes as the trustees consider beneficial to the recipient. Such a situation is probably a reasonable assumption of the trust creator's intent where income or accumulated income is concerned, but where capital is concerned can one make that assumption?

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[181] See *supra*, this ch., sec. 3(c)(i).

[182] Such powers, therefore, authorize the payment of both income and capital for the same purposes.

[183] *Supra*, note 99.

Nevertheless, in view of the wide use today of express powers conferred upon trustees to pay or apply for similar purposes the capital of interests, as well as the income, we have concluded that the revised *Trustee Act* should enable capital to be drawn upon in those cases where, through oversight or unawareness of the law, such a power does not appear in the trust instrument, and that the reservations we have expressed should be reflected in the extent to which capital is available under the proposed statutory power. Accordingly, we recommend that the revised *Trustee Act* should contain an express power of advancement based upon section 32 of the English *Trustee Act, 1925*, but modified in certain respects as has been done in several Commonwealth jurisdictions.[184]

Regarding the general scope of the statutory power, the Commission is of the opinion that the power of advancement should extend to all interests in capital, whether they are vested in any way or are contingent. Trustees should have the power to pay moneys or transfer assets, and also to sell, mortgage, or charge capital assets so that moneys can be raised.

We have also considered whether the purposes for which payments or applications might be made should be restricted to "support or similar benefit" or "advancement, support, or similar benefit". On the basis of the *ejusdem generis* principle, the restrictions in those purposes on "benefit" would prevent *Pilkington v. I.R.C.* being followed in Ontario, if that is desirable. However, we are apprehensive that such words, or restrictions like them, might in the future exclude a reason for payment or application that we would not have wished to exclude.

We have decided, therefore, to employ the phrase "maintenance, education, advancement, or benefit" for beneficiaries who are minors, thus following precedents used widely in Ontario. For adult beneficiaries, we have adopted the sole purpose of "benefit". We are of the view that the specific purposes for which we have recommended payments of capital should be permitted for minors are often irrelevant to the position of a beneficiary who is past the age of majority, and that the controls upon every trustee, which require that he act fairly and prudently, are sufficient to prevent abuse. Further, in our view, trustees should be able to apply capital for past maintenance or education, but not for past advancement in life or benefit. These latter two purposes are, in our opinion, sufficiently non-specific that only income should be available to meet such needs.

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[184] Draft Bill, ss. 49-51. The view of the English Law Reform Committee seems to be in line with our view: see English Law Reform Committee Report, *supra*, note 151.

Accordingly, the Commission recommends that, where property is held by trustees in trust for a person for any interest in capital, whether vested or contingent, and whether the interest is in possession or in remainder or reversion, the trustees should be able to pay or apply the capital or part of it, or to sell, mortgage, or charge any capital asset with a view to such payment or application, or to transfer any capital asset, for the maintenance, education, including past maintenance or education, advancement in life, or benefit of such person, if a minor, or for any purpose that is to his benefit, if an adult, as the trustees in their sole discretion think fit.[185] As we recommended in relation to the proposed statutory power of maintenance, "vested" in this context should include an interest that is vested absolutely, defeasibly, whether in whole or in part, determinably, or deferred as to possession.[186]

As with the proposed statutory power of maintenance, the Commission is of the opinion that trustees should be able to pay moneys to third parties instead of to the beneficiary himself. Accordingly, we recommend that where a beneficiary who qualifies for payments of capital is or has been married, the trustees should be able to exercise the statutory power of advancement, whether or not by way of sub-trust, in favour of the existing or former husband or wife, or children of the person so qualified, including the children of a former marriage, where, in the sole discretion of the trustees, they consider the circumstances appropriate and to the benefit of the person so qualified.[187]

The Commission is of the view that the reservations that we expressed previously concerning the scope of a statutory power of advancement should be reflected in the extent to which capital is available for advancement purposes. As we have noted, different approaches have been adopted in this regard by those Commonwealth jurisdictions that have enacted a power of advancement. The English statutory power makes one-half of the capital constituting the interest available for payment prior to vesting in possession or the attainment of majority.[188] New Zealand permits one-half of the value of the interest to be paid in this way where the total value of the interest exceeds $N.Z.15,000. Where, however, the total value is less than $N.Z.15,000, a maximum of $N.Z.7,500 is available for such payments.[189] Western Australia's formula is similar,[190] and Queensland's *Trusts Act 1973* follows suit, except that it empowers the court in any case to consent to a greater amount.[191] Victoria adopts the same solution as Queensland.[192] None of these jurisdictions has sought to limit the purposes for which capital payments may be made.

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[185] Draft Bill, s. 49(1). We would also note that the proposed statutory power of advancement should be available notwithstanding that the interest may ultimately prove to be invalid under the *Perpetuities Act*, *supra*, note 119.

[186] Draft Bill, s. 44(1).

[187] *Ibid.*, ss. 50(1) and 44(4).

[188] English *Trustee Act, 1925*, *supra*, note 45, s. 32(1)(*a*).

[189] New Zealand *Trustee Act 1956*, *supra*, note 82, s. 41(a).

[190] Western Australia *Trustees Act, 1962*, *supra*, note 83, s. 59(a).

[191] Queensland *Trusts Act 1973*, *supra*, note 83, s. 62(1).

[192] Victoria *Trustee Act 1958*, *supra*, note 83, s. 38(1).

We agree with the policy that there should be a maximum amount that can be applied for advancement purposes. We are also of the opinion that the court should be empowered to consent, on application being made, to the payment of a greater amount, where the reasons for the proposed payment would obviously be examined. Where the capital interest is small, it may seem that it should be the more strictly conserved, but we have taken the view that, if it is small, the interest will probably generate little income, so that use of the capital to meet an advancement purpose of genuine need should be possible, even if, in an especially difficult case, it might exhaust the whole of the capital. We do not think total exhaustion of the interest will occur often, but we do think that an assumption that the testator intended to assist the chosen beneficiary, rather than withhold funds, is a reasonable one. The testator or settlor is always free, of course, to express a contrary intention in the trust instrument.

Accordingly, we recommend that the trustees should be able to pay, transfer, or apply to or for a person entitled to the advance of capital a sum not exceeding $10,000, or one-half the value of the interest of such person, whichever is greater.[193] Further, the trustees should be able to apply to the court for consent to pay, transfer, or apply any sum greater than the amount recommend above.[194]

The Commission is of the view that two further restrictions should be placed upon the availability of capital for advancement purposes. First, as in the Commonwealth jurisdictions that authorize a power of advancement,[195] the Commission agrees that no payment, transfer, or application of capital should be made that would prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money or asset paid, transferred, or applied, unless that person is in existence and of full age and consents in writing to the payment, transfer, or application, or unless the court, on the application of the trustees, so orders.[196]

Secondly, it will be recalled that, in accordance with contemporary views, we have proposed that income, under the statutory maintenance power, and capital, under the statutory advancement power, should be available for the same purposes, namely, the maintenance, education, advancement in life, or benefit of a qualified beneficiary. Given the potential availability of both income and capital for similar purposes, the Commission is of the view that the income or accumulated income should be the primary source of such payments, if that is feasible. Accordingly, we recommend that no capital should be paid, transferred, or applied for the maintenance, education, past maintenance or education, advancement in life, or benefit of a qualified person, unless the income or accumulated surplus income is not available under the terms of the trust instrument for such purposes, or the income or accumulated surplus income so available is insufficient or exhausted.[197]

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[193] Draft Bill, s. 49(2).

[194] *Ibid.*, s. 49(3).

[195] See, for example, the English *Trustee Act, 1925*, *supra*, note 45, s. 32(1)(*c*), and *supra*, this ch., sec. 3(b).

[196] Draft Bill, s. 50(3).

[197] *Ibid.*, s. 49(4).

We have also concluded that the New Zealand,[198] Western Australia,[199] and Queensland[200] provisions that permit the trustees to impose conditions upon the person receiving payments or applications of capital moneys should be included in the revised *Trustee Act*. As we discussed previously,[201] such conditions may require repayment over a period of time, the payment of interest, or the provision to the trustees of a security that could be invoked by the trustees if the moneys paid out are not expended upon the object for which they were sought. As the law stands, *In re Pauling's Settlement Trusts*[202] underlines that if moneys paid out are frittered away instead of being applied properly for the object described to the trustees, trustees can only refuse to make any further payments. We doubt whether such a response is appropriate in all cases; much depends upon the nature of a subsequent request for funds. But, on a more general basis, we think that trustees who pay or apply capital moneys to or for persons who do not have fully vested interests should be able to impose conditions in suitable circumstances.

However, we should make it clear that we wish merely to enable trustees to impose conditions, and that, if loss of the funds paid out or applied occurs, it should not be considered a breach of trust by the trustees if they have acted with the "vigilance, prudence and sagacity"[203] expected of trustees in all their actions. We do not envisage that they should be responsible for the actions of others, either to the beneficiary advanced or to the person who may take by way of a gift over.

Accordingly, we recommend that, where a power to pay, transfer, or apply property for the maintenance, education, including past maintenance or education, advancement in life, or benefit of a beneficiary is vested in trustees by statute or by the trust instrument, the trustees when exercising the power should have, and should be deemed always to have had, authority to impose on the person receiving such payment any condition, whether as to repayment, payment of interest, giving security, or otherwise, and that, at any time after imposing such a condition, the trustees should be able, either wholly or in part, to waive the condition or release any obligation undertaken or any security given by reason of the condition.[204]

We further recommend that the revised Act should provide that, in determining the amount or value of the property that trustees who have imposed such a condition may pay, transfer, or apply in exercise of the power to advance capital, any money or asset repaid or retransferred to the trustees or recovered by them should be deemed not to have been so paid, transferred, or applied by the trustee.[205] Although we recommend that there should be no obligation upon trustees to impose any condition,[206] if conditions are imposed, we recommend that trustees should not be liable for any loss incurred in respect of any asset transferred or applied, including loss that arises because of the failure of a person who is subject to a condition to discharge the obligation imposed by the condition.[207]

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[198] New Zealand *Trustee Act 1956*, *supra*, note 82, s. 41A.

[199] Western Australia *Trustees Act, 1962*, *supra*, note 83, s. 60.

[200] Queensland *Trusts Act 1973*, *supra*, note 83, s. 63.

[201] See *supra*, this ch., sec. 3(c)(ii).

[202] *Supra*, note 173.

[203] *Fales, Wohlleben v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302, at 318, (1977), 70 D.L.R. (3d) 257, at 270, [1976] 6 W.W.R. 10, at 22 (S.C.C.).

[204] Draft Bill, s. 51(1).

Finally, we are of the opinion that, when imposing a condition as to security, trustees should not be affected by any restrictions upon the investment of the trust funds, whether imposed by the Ontario *Accumulations Act*,[208] or by the trust instrument.[209]

In conclusion, we wish to note two further administrative details regarding the utilization of the proposed statutory power of advancement. First, as under the majority of Commonwealth trustee legislation, we are of the view that the common law rule that provides that no account need be taken of the advancement where a division of capital is made subsequently should be reversed. Accordingly, we recommend that, where a person qualified under our recommendations to receive capital by way of advancement, or any other person, is or becomes absolutely and indefeasibly entitled to the share in the trust capital in which the person qualified had a vested or contingent interest when the money or asset was paid, transferred, or applied, that money or asset should be brought into account as part of that share of the trust capital.[210]

Secondly, we are of the opinion that, generally speaking, the statutory power of advancement should be available to trustees unless a contrary intention is expressed in the trust instrument, and we so recommend.[211] In this regard, we are of the view that a direction to accumulate income should not in itself be evidence of contrary intent.[212] We would, however, make one exception to this principle.

We are of the opinion that, if the automatic imposition of the statutory power of advancement would taint a spousal trust under the terms of the *Income Tax Act* (Canada),[213] the statutory power should be adopted expressly by the trust instrument in order to apply. Again we regret that we have had to make this exception. We would have preferred to leave the question of a capital advance to a beneficiary who, for instance, is to take in possession on the death of a widow with a life interest to the consent or otherwise of the widow. However, the *Income Tax Act* (Canada) requires that the life tenant must be the only person who may benefit from the income, or the capital generating that income, during her lifetime, if the tax benefits of a spousal trust are to be granted. In those circumstances, we do not think that by oversight or ignorance a testator or settlor or their beneficiaries should find such a tax advantage lost.

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[205] *Ibid.*, s. 51(2).

[206] *Ibid.*, s. 51(4).

[207] *Ibid.*, s. 51(5).

[208] R.S.O. 1980, c. 5.

[209] Draft Bill, s. 51(3).

[210] *Ibid.*, s. 50(2). For an interesting discussion concerning the effects of inflation on a cash sum advanced, and a proposed method of dealing with the problem, see English Law Reform Committee Report, *supra*, note 151, paras. 4.43-4.47 and Recommendation 33.

[211] *Ibid.*, s. 2(*b*).

[212] *Ibid.*, s. 44(3).

[213] See *supra*, note 107 and accompanying text.

Accordingly, we recommend that, where there is a trust for the exclusive benefit of the spouse of the testator or settlor within the terms of the *Income Tax Act* (Canada), the statutory power of advancement should not apply unless the trust instrument expressly provides otherwise.[214]

4. RESTRAINTS ON ALIENATION: THE PROTECTIVE TRUST

(a) Introduction

Our reasons for considering the protective trust at this point are twofold. First, the English *Trustee Act, 1925*, and the Australia and New Zealand Acts that have followed it, introduce three dispositive devices together, namely, the power of maintenance, the power of advancement, and the protective trust.[215] It is convenient, therefore, since we have largely modelled our recommendations concerning maintenance and advancement upon the provisions of these Acts, that we complete the discussion with a consideration of the protective trust, a device that, at present, does not find a place in the Ontario *Trustee Act*. If a settlor or testator in this Province and, in fact, in any other Canadian jurisdiction, wishes to employ the protective trust, he must set forth all the terms of that device in the trust instrument.[216]

Secondly, an important part of the protective trust device is the discretionary trust in favour of a class of beneficiaries, including the formerly protected income beneficiary, which comes into effect if the income interest terminates prematurely. This discretionary trust, unlike a pure power, involves an obligation as well as a power. The trustee must distribute the property,[217] but he is free to choose among the class of beneficiaries who will receive property, and how much a selected beneficiary will receive. The protective trust incorporates, therefore, a type of distinctive power. Before turning to an examination of the protective trust in England and the spendthrift trust in the United States, a brief discussion, by way of background, of the common law concept of restraints on alienation may be instructive.

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[214] Draft Bill, s. 44(2).

[215] The protective trust is contained in s. 33 of the English *Trustee Act, 1925*, *supra*, note 45. For the Australian state legislation and discussion thereof, see Meagher and Gummow, *supra*, note 85, at 109-12. For the New Zealand provision, see *Trustee Act 1956*, *supra*, note 82, s. 42.

[216] See Waters, *supra*, note 2, at 369, *n*. 4.

[217] *In re Gourju's Will Trusts*, [1943] Ch. 24, [1942] 2 All E.R. 605. If any income remains on the death of the principal beneficiary, it must be distributed to any surviving member, or among the surviving members, of the discretionary trust class: see *Re Forster's Settlement*, [1942] 1 All E.R. 180 (Ch.D.).

(b) RESTRAINTS ON ALIENATION: THE COMMON LAW

Few rules have been so well established in the common law as the rule that no property shall be indefinitely incapable of alienation.[218] One arm of this rule was expressed in the fines and recoveries that barred the fee tail, and in the rules that destroyed contingent remainders. The "modern" perpetuity rule was the climax of the effort to control executory future interests, and was primarily a rule governing remoteness of vesting. A companion rule, usually referred to by the same name, was developed to control the duration of non-charitable purpose trusts. This is sometimes referred to as the rule against inalienability.[219]

The other arm of the rule against restraints on alienation was the principle that the power to alienate is an essential attribute of ownership. One of the early milestones of property law, the *Statute of Quia Emptores*,[220] established that a man might freely alienate a freehold interest, and the common law doctrine of repugnancy[221] ensured that this power remained an essential attribute of ownership. Even today, it is a first principle that a restraint on the alienability of an interest is void.

Since the seventeenth century the courts have employed the perpetuity rule to pursue a consistent and relentless war upon future interests. They have shown considerably less consistency and comprehension of purpose, however, in their handling of the restraint on alienation. What the law has been particularly concerned with is the condition subsequent. A condition subsequent that merely states that the alienee shall not sell or encumber his interest is void. Being void, it is struck out, and the interest, for example, a fee simple or life estate, is enlarged to its natural size, because the condition can now never be the instrument for earlier termination of the interest. From this point, however, the courts have proceeded to draw some fine distinctions. For instance, a condition that prohibits the transferee from utilizing land for certain trade purposes may be valid.[222] This is because the courts in these cases take the view that there is no total prohibition on alienation; any restraint on alienation arises only where the transferee wishes to convey the land to another who intends to carry on the prohibited type of trade. Pursuing the same kind of thought, the courts have held that a partial restraint – "on condition he never sells the land out of the family" – is valid, provided there is a class of reasonably sizeable proportion to a member of which the transferee could sell. Ontario, in particular, has followed this distinction, one that was first made by Jessel M.R. in the English courts.[223] On the other hand, restraints for a period of time – "provided he does not sell it for the first two years" – have been held void in Ontario;[224] for, however short the period, the restraint during that time is total.[225]

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[218] See, generally, Williams, "The Doctrine of Repugnancy – I: Conditions in Gifts" (1943), 59 L.Q.Rev. 343.

[219] See Morris and Leach, *The Rule Against Perpetuities* (2d ed., 1962), at 324-27.

[220] (1290), 18 Edw. I, c. 1 (Eng.).

[221] Anything that deprives an interest in property of a right that is essentially part of that interest is "repugnant" to the concept of ownership, and the attempted deprivation is, therefore, invalid.

[222] See, for example, *Petrofina (Great Britain) Ltd. v. Martin*, [1965] Ch. 1073.

[223] See *Blackburn v. McCallum* (1903), 33 S.C.R. 65, and *Re Macleay* (1875), L.R. 20 Eq. 186.

Another distinction that arose under the common law of the mediaeval period was between interests or estates subject to conditions, and determinable interests. A condition subsequent permits the grantor to re-enter the property and terminate the interest if the terms of the condition have been broken by the holder. If that re-entry is not made, the interest simply continues. A determinable interest is one that, from the beginning, is to continue only so long as a defined circumstance does or does not happen. Obviously, the event contemplated by a condition subsequent may be the same as the event terminating the determinable interest and, provided there is no public policy objection to the terms in question,[226] the layman might expect that both would be valid or, given the restraint on alienation objection, both would be void.

Nevertheless, this was not the result at which the common law arrived. A conceptual distinction was drawn between an interest that is prematurely cut down in size – a fee simple subject to a condition subsequent – and an interest that is not a regular-sized estate, but that, although possibly called a fee simple or a life estate, has a built-in earlier termination – a determinable fee simple or life estate. For instance, a conveyance of the former type might read, "my farm called Greenacre to A in fee simple provided that the land is used for farming",[227] while an example of the latter provision might be, "my principal residence to my wife, B, for her life so long as she does not remarry".[228] This distinction was to have considerable significance in the nineteenth century. The question that arose was whether an interest could validly be made determinable by the entry of the interest holder into a transaction or arrangement whereby he alienated his interest to another.

Legal determinable fees simple do not appear to have been popular in England, possibly because their validity was questionable after the *Statute of Quia Emptores*, but there can be found in the reports determinable fees simple that are equitable. The latter arise behind a trust, and in *Re Leach*[229] an English Court upheld an equitable fee simple that had been made determinable on alienation by the transferee. The decision was controversial at the time.[230]

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[224] See *Blackburn v. McCallum*, *supra*, note 223.

[225] Restraints on alienation that are valid include those that are collateral to transactions or that arise out of contract, for example, the mortgagee who acquires the fee simple to protect his interests, with which alienability of the property would be incompatible.

[226] For example, public policy will invalidate any condition subsequent or determinability that looks forward to the divorce of a couple or to the separation of a child from its parents.

[227] In this example of a fee simple subject to a condition subsequent, when the land ceases so to be used, A's interest in Greenacre can be brought to an end.

[228] In this example of a determinable life estate, if B remarries, her interest in the house automatically comes to an end.

[229] [1912] 2 Ch. 422.

[230] Jenks, "An Inalienable Fee Simple?" (1917), 33 L.Q.Rev. 11.

A fee simple, whether legal or equitable, is the greatest estate in terms of size known to the common law. If a legal fee simple could not be made subject to a condition restraining alienation, how could an equitable fee simple or an equitable determinable fee simple be in any different position? Yet, despite the controversy, *Re Leach* still remains a valid precedent. What its standing is or would be in a Canadian court has never been tested, although as a practice English Chancery decisions are followed by Canadian courts.

For reasons that have never been clear, however, an interest less than a fee simple is regarded as being in a different position. Perhaps it is that an interest that is already limited in possible duration can be limited in other respects, although, if the prohibition on restraints on alienation is a policy position, the distinction makes very little sense to the modern mind. Nevertheless, a life interest or an interest for years, which is determinable on alienation by the life tenant or tenant for years, is unquestionably valid. This was decided in *Brandon v. Robinson*[231] in 1811, although Lord Eldon in that case regarded the principle as already established, and it was reiterated by Turner V.C. in *Rochford v. Hackman*.[232] If the life estate or estate for years is made subject to a condition stating that the grantee may not alienate, the condition is void, as would happen if a similar condition were imposed upon a fee simple. But, if the condition when construed takes the form of a forfeiture clause, or proviso for cesser, it is interpreted as an event that is to bring the interest to a close, rather than as a statement that the grantee may not alienate. It is not seen as a restraint but as a determining event.

(c) THE PROTECTIVE TRUST: ENGLAND

It is upon this foundation that the protective trust is built. The testator wishes to give his beneficiary an interest of a certain and defined amount that is to be the beneficiary's as of right, but the testator also wishes to protect the beneficiary from his own future folly, which the testator believes will cause the beneficiary to waste or otherwise lose the inheritance. This protection cannot be provided, as we have seen, if the property is given absolutely or in fee simple, whether the interest is legal or equitable, but it can be provided if the interest is an income interest for life or a term of years.

The protective trust, therefore, gives the potentially wayward beneficiary a life interest determinable on voluntary alienation, bankruptcy, or any other loss of the income to third parties. On such an event occurring, the life interest prematurely determines; the certain and defined income entitlement is thus at an end, and the beneficiary now receives what the trustees think fit to pay him, which will normally be his maintenance needs. For the remainder of the former life tenant's lifetime, the trustees of the fund that once supported the life interest are empowered to distribute the income of the fund, as they think fit, to him or others of a class of beneficiaries. The object in having a class of persons is to avoid the argument that the former life tenant is in fact entitled to the whole of the income held on discretionary trust for him, as he was formerly entitled as life tenant. If this argument were successful, the would-be transferee from the life tenant or the creditors of the life tenant would be able to assert their claims against the trustees of the discretionary trust.

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[231] (1811), 18 Ves. Jun. 429, 34 E.R. 379.

[232] (1852), 9 Hare 475, 68 E.R. 597.

Until 1925, settlors and testators who wished to employ the protective trust had to describe in detail the above components of the device in the trust instrument. In that year, however, due in large measure to its popularity, the English *Trustee Act, 1925*[233] enacted a comprehensive provision setting forth the terms of the protective trust, which a settlor or testator could incorporate by reference, if he so chose, in the trust instrument.[234] Section 33 of the English *Trustee Act, 1925* provides as follows:

> 33.—(1) Where any income, including an annuity or other periodical income payment, is directed to be held on protective trusts for the benefit of any person (in this section called 'the principal beneficiary') for the period of his life or for any less period, then, during that period (in this section called the 'trust period') the said income shall, without prejudice to any prior interest, be held on the following trusts, namely: -
>
> (i) Upon trust for the principal beneficiary during the trust period or until he, whether before or after the termination of any prior interest, does or attempts to do or suffers any act or thing, or until any event happens, other than an advance under any statutory or express power, whereby, if the said income were payable during the trust period to the principal beneficiary absolutely during that period, he would be deprived of the right to receive the same or any part thereof, in any of which cases, as well as on the termination of the trust period, whichever first happens, this trust of the said income shall fail or determine;
>
> (ii) If the trust aforesaid fails or determines during the subsistence of the trust period, then, during the residue of that period, the said income shall be held upon trust for the application thereof for the maintenance or support, or otherwise for the benefit, of all or any one or more exclusively of the other or others of the following persons (that is to say) -
>
> (*a*) the principal beneficiary and his or her wife or husband, if any, and his or her children or more remote issue, if any; or
>
> (*b*) if there is no wife or husband or issue of the principal beneficiary in existence, the principal beneficiary and the persons who would, if he were actually dead, be entitled to the trust property or the income thereof or to the annuity fund, if any, or arrears of the annuity, as the case may be;
>
> as the trustees in their absolute discretion, without being liable to account for the exercise of such discretion, think fit.
>
> (2) This section does not apply to trusts coming into operation before the commencement of this Act, and has effect subject to any variation of the implied trusts aforesaid contained in the instrument creating the trust.

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[233] *Supra*, note 45.

[234] See *Underhill's Law relating to Trusts and Trustees*, *supra*, note 2, at 146.

(3) Nothing in this section operates to validate any trust which would, if contained in the instrument creating the trust, be liable to be set aside.

Accordingly, this provision enables the settlor or testator to import the protective trust into his trust instrument by a shorthand phrase: the words "to A on protective trust" bring the statutory scheme of determinable life interest and discretionary trust into operation.[235] It is this device that New Zealand,[236] and all the states of Australia,[237] except South Australia, have adopted in their own trustee legislation.

(d) THE SPENDTHRIFT TRUST: UNITED STATES

The term "spendthrift trust" was coined in the Pennsylvania courts in the early nineteenth century. Two or three states have since incorporated it in statutes on the subject, but in the great majority of states it remains a case law term.[238] As a consequence, the term has a fairly well understood meaning. Broadly, it refers to all trusts where the beneficiary's interest is subject by the trust language or by statute to the proviso that the beneficiary may not alienate his interest whether as to income or capital.

The spendthrift trust is built upon the twin foundations of inalienability and indestructibility. Acceptance of the validity of a restraint on alienation creates inalienability. The spendthrift trust is indestructible because a spendthrift provision is considered to be a material purpose of the trust, and, under American jurisprudence, the courts will not vary or terminate a material purpose of a trust;[239] accordingly, the beneficiary is unable to terminate the trust. The spendthrift trust is, therefore, clearly marked off from the protective trust of English and Canadian common law, which does not preclude alienation explicitly, but merely creates a determinable life interest with respect to the income entitlement of a beneficiary.

But, although the essential meaning of spendthrift trust is clear, there has never been a clear delineation of the terms to be found in such a trust. Indeed, there is a remarkable variety in the terms of these trusts permitted in the various American jurisdictions. For instance, there is no consensus on the persons who, as beneficiaries, can be made subject to such restraint, the estates that can be restrained, or the type of property that can be the subject matter of a spendthrift trust, and each jurisdiction has worked out its own formula with respect to how far, if at all, the claims of creditors will be satisfied. So great is this disparity that some would-be definitions of the spendthrift trust express the position as it exists in certain states only. For example, in Pennsylvania, this trust has been defined as one where the beneficiary's interest may be reached only to a limited degree by his creditors. But in at least two states, Delaware and Nevada, the beneficiary's interest is totally immune from any creditors' claims.

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[235] Although, presumably, if a settlor or testator wishes to insert his own provisions in the trust instrument for a protective trust, he may do so, as long as they conform to the case law restrictions imposed upon the creation of such trusts.

[236] New Zealand *Trustee Act 1956*, *supra*, note 82, s. 42.

[237] New South Wales *Trustee Act, 1925*, *supra*, note 83, s. 45; Victoria *Trustee Act 1958*, *supra*, note 83, s. 39; Western Australia *Trustees Act, 1962*, *supra*, note 83, s. 61; Queensland *Trusts Act 1973*, *supra*, note 83, s. 64; and Tasmania *Trustee Act 1898*, Tasm. Stat. 1826-1974, c. 30.

[238] See, generally, Griswold, *Spendthrift Trusts* (2d ed., 1947); Scott, *The Law of Trusts* (3d ed., 1967), §§ 151-53, at 1131-76; and Bogert, *The Law of Trusts & Trustees* (2d ed., 1979), §§ 222-27.

[239] For a discussion of the material purpose doctrine and its relationship to the termination of trusts in the United States, see *infra*, ch. 7, sec. 2(c).

The most comprehensive type of protection involving the spendthrift trust exists in Delaware[240] and Nevada.[241] No particular words are required for the creation of such a spendthrift clause, and the trust may last for the length of the perpetuity period. Provision may be made by the trustees for the beneficiary alone, and this does not include the beneficiary's spouse, child, or dependant, whatever their need, unless the settlor expressly provides to the contrary. The beneficiary may be any person; there is no restriction. The trustees are authorized to make payments to the beneficiary alone, and any act of his outside what is permitted by the trust is of no effect. Creditors have, therefore, no rights against the trust property.[242] Any property, real or personal, may be subject to a spendthrift trust, and the beneficiary's interest may be a limited interest or an absolute interest. Both voluntary and involuntary alienation are of no effect, except that in relation to an absolute interest involuntary alienation alone is void.

It should be said that in no other part of the United States today is the spendthrift trust allowed such licence. Rather, the move is towards greater recognition of creditor access to the trust fund that provides the beneficiary's interest. Five states,[243] for example, allow certain categories of creditor to attach the beneficiary's interest, and any attempt to oust the claims of these creditors is invalid. The most obvious persons to receive the benefit of such provisions are the spouse and the children of the beneficiary, and it is their expectations that have been most widely recognized. Creditors who have also been recognized are the suppliers of necessaries, medical services, and legal services in connection with the trust.

This policy meets much of the objection, but it is somewhat arbitrary in the creditors it prefers. For example, in New York State,[244] which has probably the most developed and equitable law on spendthrift trusts, the aim of the existing law is to prevent the beneficiary from entering into unwise transactions involving the alienation of his interest, but at the same time to allow creditors to seize assets that, but for the trust, would be seizable. New York is particularly concerned with claims of spouses for alimony, and of children for maintenance, as well as claims made by suppliers of necessaries and persons injured through the torts of the beneficiary. Each creditor has a claim against the income of the trust fund that is in excess of the income necessary for the support and education of the spendthrift beneficiary, and in some circumstances against the capital of the fund that provides the spendthrift's income interest.[245]

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[240] Delaware Code Ann., tit. 12, § 3536.

[241] Spendthrift Trust Act, Nevada Rev. Stat., §§ 166.010-166.160

[242] Tennessee, Minnesota, and West Virginia also statutorily permit total immunity from creditors: see Bogert, *supra*, note 238, § 222.

[243] Illinois, Indiana, Missouri, Pennsylvania, and Washington: see Bogert, *supra*, note 238, § 222, *n*. 94, and § 227.

[244] For a full discussion of proposals made in 1963 to the State legislature, see Temporary State Commission on Modernization, Revision and Simplification of the Law of Estates, Second Report (Legislative Document 1963, No. 19), Appendix M., at 512 *et seq*. The proposals became law, and now appear as N.Y. Est., Powers & Trusts Law, § 7-1.5, as am., and § 7-1.6. See, also, Scott, *supra*, note 238, §§ 152.1, 157.1, and 157.2.

(e) CONCLUSIONS

The Commission has concluded, for a number of reasons, that a statutory protective trust should not be introduced in the revised Ontario *Trustee Act*. We are concerned that there is insufficient evidence that such a trust is so widely employed by practitioners as to justify its introduction in statutory form in Ontario. We doubt also whether it represents the way in which draftsmen in this Province would usually deal with the problem of the "wastrel". If a settlor or testator is concerned that his beneficiary may prove incapable of managing his assets wisely, he may think it enough to give the beneficiary an income interest only, and to confer upon the trustees a power of encroachment over capital for stated purposes in favour of the beneficiary. In a more extreme case, the testator or settlor may create a discretionary trust of income and capital in favour of the beneficiary, and confer upon another person a gift over should the fund not be totally expended upon the beneficiary in the beneficiary's lifetime.

If the settlor or testator is apprehensive of unwise conduct by the beneficiary during his youth, he may defer vesting in possession and in interest to a later age, such as twenty-five or thirty years. Alternatively, the trust instrument may provide that instalments of capital shall be payable at intervals throughout the beneficiary's life. In these ways, and if the conditions are drafted so as to prevent the termination of the trust under the rule in *Saunders v. Vautier*[246] before the desired time, the settlor or testator may put different degrees of control upon the beneficiary's receipt in order to ensure that all the donor has to give will not be lost to the beneficiary through folly or dissipation or seizure by creditors.

Nonetheless, the protective trust goes further than these devices. Because it is not regarded as a restraint on alienation – which today we find indefensible as being incompatible with ownership – it is possible for the settlor or testator to provide property by way of an interest for the immediate enjoyment of the beneficiary, and then withdraw the interest at the moment creditors attempt to seize it, whether before or after bankruptcy proceedings. Indeed, as *Re Williams*[247] shows, an ingenious settlor or testator can provide that, as soon as the beneficiary is free of the creditor's pursuit or is discharged from bankruptcy, a new protected life interest comes into effect, which in turn will give way to a new discretionary trust if a further voluntary or involuntary alienation is about to take place. In *Re Williams*, protective trusts ran in series, and the result was that the beneficiary was almost as well protected as if he had been the beneficiary of a Delaware or Nevada "spendthrift" trust.

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[245] Besides New York, there are a number of other states that, by statute, make surplus income available to creditors; for example, California, Connecticut, Michigan, Minnesota, Montana, North Dakota, Oklahoma, South Dakota, and Wisconsin. Other states, such as Alabama, Louisiana, North Carolina, and Virginia, have set an annual income limit that cannot be attached by creditors or be alienated: see Scott, *supra*, note 238, § 152.1, at 1143 and 1146.

[246] See, *infra*, ch. 7, for a discussion of variation and premature termination of trusts.

The only disadvantage suffered by the beneficiary of protective trusts in series is that, while creditors are still in pursuit or while he remains a bankrupt, he receives from the trust only what the trustees will give him, which, given the *Execution Act*,[248] is likely to be no more than essential maintenance. In view of the long struggle in the United States over the spendthrift trust between those who believe the donor should be able to impose restrictions upon his donee as he pleases, and those who feel that creditors should be paid their just due, it is surprising that the protective trust, particularly where such trusts run in series, should never have been questioned in those jurisdictions that provide statutorily for this device. On balance, we do not consider that there is a case for the introduction of a statutory form of protective trust in the revised Ontario *Trustee Act*, and accordingly recommend that such a device should not be incorporated in the revised Act.

We also consider that the failure of the law to invalidate a restraint on alienation imposed upon a life estate or other limited interest, where the restraint is introduced by way of a limitation, or determinable interest, is incompatible with the invalidation of a restraint on the alienability of a legal fee simple. However, although this is an additional reason in our minds for not recommending the introduction of the protective trust in the revised Act, we have decided not to make any recommendation concerning the restraint on voluntary alienation, as it is a policy matter that involves the general law of property, and should be examined further in that context.[249]

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[247] [1947] O.R. 11 (C.A.). See, also, *Re Richardson's Will Trusts*, [1958] Ch. 504, commented upon in "Notes" (1958), 74 L.Q.Rev. 182, where Megarry states, at 184, that "England lacks the device of the spendthrift trust in the American sense, but it is far from clear that the fullest possible use is being made of the existing machinery of protective and discretionary trusts".

[248] R.S.O. 1980, c. 146.

[249] The Commission, at present, has on its agenda a project dealing with the Basic Principles of Land Law, which will examine restraints on alienation in greater detail.

We did consider whether a restraint on voluntary alienation should be permitted by way of a protective trust, but only to the maximum of the particular beneficiary's support needs, an idea derived from the laws of some American states that have statutorily modified the case law spendthrift trust. We considered the New York provision that permits spendthrifts to assign within the family (spouse, issue, ancestor, brother, sister, uncle, aunt, nephew or niece) any income received from the spendthrift trust in excess of $10,000 per annum. No such family member may receive other than as a donee, and none may himself alienate except within the same class of the spendthrift beneficiary's relations. Our own preference would have been to allow any alienation, whether gratuitous or for value, over the maintenance needs of the beneficiary and his dependants, including support and maintenance claims. We were attempting to find a formula for the assessment of need, so that the discretion of the court need not again be involved. See *supra*, note 244.

A restraint as to involuntary alienation, however, has wider implications. It denies an unsecured creditor or a trustee in bankruptcy the income of the trust arising after a creditor attempts to recover or the protected life tenant is put into bankruptcy, even though the life tenant enjoyed all income arising prior to these events. The protective trust employed in practice intends protection not only against sale, mortgage, charging, and actions of that kind by the beneficiary himself, but events whereby the life tenant "would be deprived of the right to receive the [income] or any part thereof".[250] These "events" clearly include the claims of creditors or of a trustee in bankruptcy.

An ordinary bankrupt is entitled to retain only such part of his property as is necessary for the essential support and needs of himself and his dependants.[251] We do not consider it right that a protected life tenant, whose property rights disappear upon his creditor claiming payment or upon his being put into bankruptcy, should have an advantage, not shared by others, through the discretionary trust, under which he has no property rights, and possibly a further protected life interest at a later time with respect to the same property. It could also be said that an immediate discretionary trust denies unsecured creditors of the beneficiary a recovery that the lifestyle of the beneficiary, who is receiving payments of trust income or capital even though he has no right to this income or capital, might have led them to expect.

While we would not preclude the insertion in trust instruments of the device of the protective trust, we believe that creditors should have greater rights than they have at present to reach the interest of the protected beneficiary. We have concluded, therefore, that, where an instrument creates a restraint on involuntary alienation by way of an equitable determinable interest, followed by a discretionary trust in favour of the former interest holder and a volunteer class of beneficiaries, creditors of the principal beneficiary should be able to apply to the court for payment out of future income of the trust. In a particularly severe case, the court should also be able to order that capital of the trust be available to a creditor, if future income would be inadequate. In a case of demonstrated need, the principal beneficiary, that is, the former limited interest holder, should be entitled to ask the court, where an application by a creditor has been brought, that he be permitted an income under the discretionary trust that will supply the basic needs of himself and his dependants.[252]

Accordingly, we recommend that the revised Act should provide that, where property is held on trust for a person – "the protected beneficiary" – for an interest that is determinable on a claim being made by a creditor or trustee in bankruptcy against the income payable to the protected beneficiary, such a claimant should be able to apply to the court for payment of his claim, and that the court should be empowered to order the payment of the claim out of income arising from the trust until the interest but for the determinability would have terminated.[253]

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[250] English *Trustee Act, 1925*, *supra*, note 45, s. 33(1)(i).

[251] *Bankruptcy Act*, R.S.C. 1970, c. B-3, s. 47(*b*).

[252] Alternatively, the revised *Trustee Act* might have simply stated that no protective trust may validly restrain involuntary alienation. This would mean that the life interest would continue, despite claims by creditors or the life tenant's trustee in bankruptcy, and that future income would therefore be attachable. However, we have preferred a course that would permit the court to examine the circumstances in which the debt arose.

We further recommend that, if it is established to the satisfaction of the court that any successive beneficiary, including any beneficiary of a discretionary trust, as to the income or capital of the trust, has derived any benefit from any debt incurred by the protected beneficiary, payment of which is being sought by the creditor, the court should be empowered to order that the whole or part of the capital of the trust be released from the trust to meet, in whole or in part, the claim of the creditor or trustee in bankruptcy of the protected beneficiary.[254]

We also recommend that the court should be able to allow the protected beneficiary to receive, whether or not at the further discretion of the trustees, such income as, in the opinion of the court, will provide reasonable maintenance for the beneficiary and his dependants.[255]

The fact that we have not recommended the adoption of section 33 of the English *Trustee Act, 1925*, which would introduce the protective trust in the revised *Trustee Act*, does not affect in any way the ability of settlors or testators to provide expressly for such a trust in the trust instrument, if they so choose. Nonetheless, we are of the view that our proposed provisions regarding the ability of creditors to apply to the court for payment of their claims from the interest of the "protected beneficiary" should not be capable of exclusion by the settlor or testator. If such were the case, trust instruments would probably, as a matter of course, exclude the proposed statutory provision in order to provide the protected beneficiary with the maximum protection from possible creditors, thereby rendering the statutory provision meaningless. Accordingly, we recommend that the proposed provisions regarding the ability of creditors to apply to the court for payment of their claims should not be subject to a contrary intention expressed in the trust instrument.[256]

RECOMMENDATIONS

The Commission makes the following recommendations:

1. The revised *Trustee Act* should contain an express power of maintenance based upon section 31 of the English *Trustee Act, 1925*, but modified in certain respects as has been done in several Commonwealth jurisdictions.

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[253] Draft Bill, s. 52(1).

[254] *Ibid.*, s. 52(2).

[255] *Ibid.*, s. 52(3).

[256] *Ibid.*, s. 52(4).

2. The proposed statutory power of maintenance should apply to all interests of whatever nature – that is, whether the property interest is vested or contingent – unless the testator or settlor has expressly provided otherwise.

3. To ensure that all types of vested interest are included within the proposed statutory provision, the revised *Trustee Act* should stipulate that a vested interest includes an interest that is vested absolutely, defeasibly, whether in whole or in part, determinably, or deferred as to possession.

4. The revised *Trustee Act* should provide expressly that, notwithstanding the terms of the trust instrument, all vested and contingent interests, whether arising by will or otherwise and whatever the nature of the property subject to them, should carry the intermediate income from the date the interest arises, except so far as such income or a part of it is expressly disposed of otherwise.

5. The proposed statutory power of maintenance in the revised *Trustee Act* should be exercisable by the trustees in their sole discretion in favour of a beneficiary during his minority, whether or not there is any other fund applicable to the same purpose or any person is bound by law to provide for the maintenance or education of the beneficiary.

6. In addition to authorizing the payment of the whole or such part of the income of the property as may in all the circumstances be reasonable for the maintenance, education, or benefit of a minor, the revised *Trustee Act* should provide expressly that income may be available for purposes related to advancement in life.

7. Regarding the position of a beneficiary whose interest remains contingent after he attains majority, the revised *Trustee Act* should contain a provision to the effect that, in the case of any person who has attained the age of eighteen years and does not have an income or capital interest vested in interest and in possession, the trustees may, until he either attains such an interest or dies, or until failure of his interest, pay to that person for his benefit the whole or any part of the income as they in their sole discretion think fit, whether or not there is any other fund available for payments to him.

8. Where a person who under our previous recommendations would be entitled to receive discretionary income payments is or has been married, the trustees may exercise their discretionary power to pay that income, by way of sub-trust or otherwise, in favour of the existing or former husband or wife or the children of the person so qualified, including the children of a former marriage, where in the sole discretion of the trustees they consider the circumstances appropriate and to the benefit of the person so qualified.

9. The revised Act should contain a provision dealing with accumulated income similar to section 31(2) of the English *Trustee Act, 1925*, but amended in certain respects. Specifically, the revised *Trustee Act* should provide:

(a) that the excess income accumulated prior to full vesting shall be paid to the beneficiary at majority or full vesting, whichever is later;

(b) that the personal representatives of a beneficiary with a vested interest who dies in infancy, or of an adult beneficiary with a vested interest who dies prior to the vesting in possession, shall be entitled to receive the accumulated excess income. However, this provision should not be viewed as entitling a person who has an interest in capital vested in interest to call for the capital or the accumulations during his lifetime other than at the close of his minority or when his interest vests in possession, whichever occurs last;

(c) that for all purposes where a contingent interest is involved, and where the beneficiary dies or the interest fails before the contingency occurs, accumulations accrue to capital; and

(d) that, during the minority of the beneficiary or during such further time as under our recommendations maintenance may be paid, trustees may pay or apply the accumulated income or any part of it as if the accumulations were income arising in that current year.

10. The revised *Trustee Act* should contain a provision to the effect that trustees may pay or apply income or accumulations for the past maintenance, education, advancement in life, or benefit of a person who is a minor, and may pay accumulations as they think fit for the benefit of persons mentioned in Recommendations 7 and 8.

11. The revised *Trustee Act* should provide that the proposed statutory power of maintenance applies to all trusts whenever created, except as follows:

(a) where a contrary intention is expressed in the trust instrument;

(b) where a trust would, but for the proposed statutory power of maintenance, constitute a spousal trust under the terms of the *Income Tax Act* (Canada), in which case the statutory power of maintenance should only apply if the trust instrument expressly so provides; and

(c) where the trust instrument under which the interest arises takes effect before the revised Act comes into force.

12. The revised *Trustee Act* should contain an express power of advancement based upon section 32 of the English *Trustee Act, 1925*, but modified in certain respects as has been done in several Commonwealth jurisdictions.

13. The proposed statutory power of advancement in the revised *Trustee Act* should provide that, where property is held by trustees in trust for a person for any interest in capital, whether vested or contingent, and whether the interest is in possession or in remainder or reversion, the trustees may pay or apply the capital or part of it, or sell, mortgage, or charge any capital asset with a view to such payment or application, or transfer any capital asset, for the maintenance, education, including past

maintenance or education, advancement in life, or benefit of such person, if a minor, or for any purpose that is to his benefit, if an adult, as the trustees in their sole discretion think fit.

14. The revised *Trustee Act* should provide that "vested" in this context includes an interest that is vested absolutely, or defeasibly, whether in whole or in part, determinably or deferred as to possession.

15. The revised *Trustee Act* should contain a provision to the effect that, where a beneficiary who qualifies for payments of capital is or has been married, the trustees may exercise the statutory power of advancement, by way of sub-trust or otherwise, in favour of the existing or former husband or wife or the children of the person so qualified, including the children of a former marriage, where, in the sole discretion of the trustees, they consider the circumstances appropriate and to the benefit of the person so qualified.

16. Regarding the scope of the proposed statutory power of advancement, the revised *Trustee Act* should provide as follows:

    (a) that the trustees may pay, transfer, or apply to or for a person entitled to the advance of capital a sum not exceeding $10,000, or one-half the value of the interest of such person, whichever is greater;

    (b) that the trustees may apply to the court for consent to pay, transfer, or apply any sum greater than the amount stipulated in (a);

    (c) that no payment, transfer, or application of capital may be made that would prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money or asset paid, transferred, or applied, unless that person is in existence and of full age and consents in writing to the payment, transfer, or application, or unless the court, on the application of the trustees, so orders; and

    (d) that no capital may be paid, transferred, or applied for the maintenance, education, past maintenance or education, advancement in life, or benefit of a qualified person, unless the income or accumulated surplus income is not available under the terms of the trust instrument for such purposes, or the income or accumulated surplus income so available is insufficient or exhausted.

17. The revised *Trustee Act* should provide that, where a power to pay, transfer, or apply property for the maintenance, education, past maintenance or education, advancement in life, or benefit of a beneficiary is vested in trustees by statute or by the trust instrument, the trustees when exercising the power have, and should be deemed always to have had, authority to impose on the person receiving such payment any condition, whether as to repayment, payment of interest, giving security, or otherwise, and that, at any time after imposing such a condition, the trustees may, either wholly or in part, waive the condition or release any obligation undertaken or any security given by reason of the condition.

18. The revised *Trustee Act* should contain a provision to the effect that, in determining the amount or value of the property that trustees who have imposed such a condition may pay, transfer, or apply in exercise of the power to advance capital, any money or asset repaid or retransferred to the trustees or recovered by them should be deemed not to have been so paid, transferred, or applied by the trustee.

19. The revised *Trustee Act* should provide that there is no obligation upon trustees to impose any condition, but that, if conditions are imposed, trustees are not liable for any loss incurred in respect of any asset transferred or applied, including loss that arises because of the failure of a person who is subject to a condition to discharge the obligation imposed by the condition.

20. The revised *Trustee Act* should provide that, when imposing a condition as to security, trustees are not affected by any restrictions upon the investment of the trust funds, whether imposed by the Ontario *Accumulations Act* or by the trust instrument.

21. The revised *Trustee Act* should provide that, where a person qualified under our recommendations to receive capital by way of advancement, or any other person, is or becomes absolutely and indefeasibly entitled to the share in the trust capital in which the person qualified had a vested or contingent interest when the money or asset was paid, transferred, or applied, that money or asset must be brought into account as part of that share of the trust capital.

22. The revised *Trustee Act* should provide that the statutory power of advancement applies to all trusts whenever created, except as follows:

    (a) where a contrary intention is expressed in the trust instrument; but a direction to accumulate income should not in itself be evidence of a contrary intention; and

    (b) where a trust would, but for the proposed statutory power of advancement, constitute a spousal trust under the terms of the *Income Tax Act* (Canada); in that case, the statutory power of advancement should only apply if the trust instrument expressly so provides.

23. A statutory form of protective trust should not be introduced in the revised Ontario *Trustee Act*.

24. While settlors and testators should not be precluded from including provisions for protective trusts in trust instruments, creditors should have a right to apply to the court to reach the interest of the protected beneficiary. Accordingly, the revised *Trustee Act* should contain a provision to the effect that, where property is held on trust for a person – "the protected beneficiary" – for an interest that is determinable on a claim being made by a creditor or trustee in bankruptcy against the income payable to the protected beneficiary, such a claimant may apply to the court for payment of his claim, and the court may order the payment of the claim out of

income arising from the trust until the interest but for the determinability would have terminated.

25. The revised *Trustee Act* should provide that, if it is established to the satisfaction of the court that any successive beneficiary, including any beneficiary of a discretionary trust, as to the income or capital of the trust, has derived any benefit from any debt incurred by the protected beneficiary, payment of which is being sought by a creditor, the court may order that the whole or part of the capital of the trust be released from the trust to meet, in whole or in part, the claim of the creditor or trustee in bankruptcy of the protected beneficiary.

26. The revised *Trustee Act* should provide that the court may allow the protected beneficiary to receive, whether or not at the further discretion of the trustees, such income as in the opinion of the court will provide reasonable maintenance for the beneficiary and his dependants.

27. Recommendations 24, 25, and 26 should not be subject to a contrary intention expressed in the trust instrument.

CHAPTER 6

CONTRIBUTION AND INDEMNITY AMONG TRUSTEES

1. THE RIGHTS OF TRUSTEES: AN OVERVIEW

First and last a trustee is a fiduciary. A trustee has duties to discharge, and has powers and discretions conferred upon him to enable him to carry out his tasks. Although a trustee is managing property for the benefit of others, nonetheless, he is vested with title to that property in his own name and is responsible to third parties as the owner. A trustee also contracts in his own name, and is personally liable for torts arising out of his fiduciary acts, as well as those associated with the property of which he is the vested title holder. Accordingly, a trustee has certain rights and protections, as does an agent at law.

For example, a trustee is entitled to be reimbursed from the trust assets[1] for any expense that he incurs personally while acting in the course of his duties.[2] Any obligation of a contractual or tortious nature that imposes costs upon him personally, and which was assumed or incurred without any breach of trust on his part, is also not his to bear; a trustee may recover these costs from the trust property. Indeed, there is no reason why a trustee should sustain any costs, even initially, on behalf of the trust. When contracting with a third party on behalf of the trust, a trustee may have a term introduced in the contract that he undertakes no personal liability. In these circumstances, the third party has recourse only against the trust property; the third party assumes the risk of the availability and adequacy of those resources to compensate him in the event of a breach of contract by the trustee. Of course, if the third party is unwilling to agree to such an exculpatory clause, the trustee will remain personally liable, although, as stated, in the absence of breach of trust, he may recover any costs from the trust assets.

Other protections recognize the trustee's essentially managerial task. Statute confers upon him the right to obtain the opinion, advice, or direction of the court if he is in doubt about the meaning of the trust instrument, or as to the law concerning any factual situation in which he finds himself.[3] He may also pay moneys into court where the entitled beneficiary is a minor, or where other circumstances justify him in seeking this protection for trust funds.[4] At the close of the trust, or on his retirement or otherwise ceasing to be a trustee, he is entitled to have his accounts settled to the satisfaction of the beneficiaries or of the court, and then to be granted a release or discharge from any further liability.[5]

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[1] In the Canadian common law provinces, the trustee also has a statutory right to remuneration: in Ontario, see *Trustee Act*, R.S.O. 1980, c. 512, s. 61.

[2] The trust beneficiary also has a personal obligation to indemnify the trustee for liabilities properly incurred by the latter: see *Hardoon v. Belilios*, [1901] A.C. 118 (P.C.), cited with approval in *Matheson v. Salah* (1962), 33 D.L.R. (2d) 146 (N.S.S.C.), at 150-51.

Rights also attach to a trustee when breach of trust occurs. As we discussed in chapter 2,[6] the court has a statutory discretion to excuse a trustee wholly or in part from any personal liability for his breach of trust and, accordingly, to relieve him from the obligation to make good the loss that the trust has suffered.[7] In such a case, if he is the sole trustee, the trust beneficiaries effectively bear the amount of loss for which the trustee was excused. If he is one of two or more trustees, however, the result is different. Co-trustees are jointly and severally liable for breach of trust, that is, for making good the loss to the trust.[8] The beneficiaries may therefore proceed against all, some, or any one of the trustees to recover the whole of the loss to the trust. It follows that, first, the trust beneficiaries will look to the non-excused trustee or trustees to make good the loss, and, secondly, that, after the trust has been compensated, the non-excused trustees will be prevented from looking to the excused trustee for the whole or a part of the contribution that, as between the trustees themselves, he would otherwise have been compelled to make.

Equity also extends protection to a sole trustee or co-trustees against a suit brought by beneficiaries for loss incurred by the trust. Under the case law[9] and statute,[10] trustees are entitled to be indemnified out of the interest of any trust beneficiary who has instigated, requested, or consented in writing to the breach of trust in question. A beneficiary who does none of these things, but who participates in the breach, becomes a constructive trustee, a fact that the appointed trustee may plead if later sued by the beneficiary for the loss caused to the trust by the breach. The indemnification may be to the extent of the whole or part of the beneficial interest, as the court thinks fit, and, in judging the equity of the situation, the court is not concerned with whether the beneficiary benefited personally from the breach. If a beneficiary has merely consented to the breach of trust, on the other hand, under the case law he must be shown to have personally benefited.[11] This type of indemnity does not, however, permit the trustees to put trust moneys otherwise due to the beneficiary into their own pockets, the trustees having already compensated the trust for the loss. It is merely a defence to trustees who are sued by a beneficiary, whether or not he was the beneficiary involved in the breach. They ask that they be indemnified by the impounding of the involved beneficiary's interest.[12]

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[3] *Trustee Act*, *supra*, note 1, s. 60.

[4] *Ibid.*, s. 36.

[5] See Hayton (ed.), *Underhill's Law relating to Trusts and Trustees* (13th ed., 1979), at 611 *et seq.*

[6] See *supra*, ch. 2, sec. 2(d).

[7] *Trustee Act*, *supra*, note 1, s. 35. See, also, Draft Bill, s. 69.

[8] Williams, *Joint Obligations* (1949), at 159. If a man is severally as well as jointly obligated, he remains liable to an action by the injured party, though that party has already secured judgment against another of the jointly obligated persons. This does not mean that the injured party can recover his loss more than once; it means that he can proceed against another of the obligated persons if he is unable to enforce the full judgment against the first.

[9] See, for example, *Underhill's Law relating to Trusts and Trustees*, *supra*, note 5, at 747 *et seq.*

[10] In Ontario, see the *Trustee Act*, *supra*, note 1, s. 34. See, also, Waters, *Law of Trusts in Canada* (1974), at 856-61.

Nevertheless, there are circumstances in which a trustee is entitled to be indemnified by way of recoupment. These arise out of the law of contribution and indemnity as between trustees liable for breach of trust. As we have seen, each co-trustee who is liable for breach of trust has a responsibility to the trust to make good the whole of the loss that has occurred. In other words, because the law considers trustees to be jointly and severally liable, the beneficiaries can recover the whole from any one trustee. Thereafter, as between themselves, the other trustees who are also liable for the breach of trust have a duty to contribute to the trustee who has compensated the trust.[13] That is, in the absence of the court excusing any of the trustees for the breach under its statutory discretion, all trustees are liable for contribution. Of course, if all the liable trustees are joined in the action brought by the injured beneficiaries, the court may order each to pay a share at that juncture.

Generally, trustees share equally, on the basis that equality is equity;[14] to pay a share is to contribute. In certain circumstances, however, a trustee will have to pay more than his share. A trustee will have to indemnify the trustee who has made good the loss – that is, to pay an amount equal to the whole of the compensation to the trust that the other trustee has made – where his own conduct constituted fraud, or where his co-trustees relied upon the correctness of his legal advice as a solicitor-trustee. In effect, the trustee with a duty to indemnify carries the entire burden of making good the loss to the trust. In other cases, where a trustee also has a beneficial interest, he will be compelled to indemnify his co-trustees to the extent of the value of that beneficial interest.

While, for the most part, the law governing the rights and protections of trustees is satisfactory, we are of the view that one area, contribution and indemnity among trustees, deserves our attention. Accordingly, we now turn to an examination of the law of contribution and indemnity among trustees in greater detail.

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[11] See Pettit, *Equity and the Law of Trusts* (4th ed., 1979), at 386.

[12] *Underhill's Law relating to Trusts and Trustees*, *supra*, note 5, at 753.

[13] See Waters, *supra*, note 10, at 854-56.

[14] See Williams, *Joint Torts and Contributory Negligence* (1951), at 127, and Pettit, *supra*, note 11, at 382. However, if a liable trustee is insolvent when contribution is sought from him, the solvent liable co-trustees have a contribution obligation equal to their number: see Scott, *The Law of Trusts* (3d ed., 1967), § 258, at 2209.

2. CONTRIBUTION AND INDEMNITY: THE PRESENT LAW

In Ontario, there are no statutory provisions that deal directly with the issue of contribution and indemnity among trustees. Rather, the matter is governed by the common law, or, if a testator or settlor provides, by express terms contained in the trust instrument. The case law, as we have seen, provides that when contribution takes place among trustees each trustee must contribute an equal share. Generally speaking, equity is not concerned that one trustee's breach may be more grievous than that of another. No trustee is primarily responsible for the conduct of the trust's affairs, unless the trust instrument provides to the contrary. In other words, subject to any provision in the trust instrument, all those in breach are, *prima facie*,[15] in a position of parity.

In the exceptional case, however, such as where a trustee is in breach because of fraud, the courts of Equity traditionally adopted the view that the loss should lie where it falls.[16] Accordingly, a fraudulent trustee would be responsible for the entire loss incurred by the trust. In addition, as mentioned previously, there are several other situations where a court will order that, rather than contribute an equal share with the other trustees for the loss, a trustee must indemnify, that is, make good the entire loss occasioned by the breach. It is these indemnity circumstances that we now turn to consider.

(a) THE CASE LAW INDEMNITIES

There are few case law authorities on indemnity, and the law still requires some clarification. In a sense, the case law is not yet fully developed in the Commonwealth jurisdictions, because the limits of the obligation to indemnify are still not firmly established. First, there is the issue of indemnity itself, and the circumstances in which that obligation will arise. Initially, the courts were willing to order indemnification of the loss by a trustee primarily in two situations: first, in the case of the trustee who had fraudulently appropriated trust property; and secondly, in the case of the solicitor-trustee who had caused the breach of trust by misinforming his co-trustees as to the law. However, as Cotton L.J. said in the following passage from *Bahin v. Hughes*, these instances should not be considered exhaustive:[17]

> Now I think it wrong to lay down any limitation of the circumstances under which one trustee would be held liable to the other for indemnity, both having been held liable to the *cestui que trust*; but so far as cases have gone at present, relief has only been granted against a trustee who has himself got the benefit of the breach of trust, or between whom and his co-trustees there has existed a relation, which will justify the Court in treating him as solely liable for the breach of trust.

In *Chillingworth v. Chambers*[18] ten years later, the Court of Appeal in England returned to review the cases on this issue, and confirmed a third situation where a trustee would be ordered to make good the loss incurred by the trust. Where the trustee is also a beneficiary, he will be required to indemnify to the extent of his beneficial interest.

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[15] See Waters, *supra*, note 10, at 854-56.

[16] See Williams, *supra*, note 14, at 127, and Pettit, *supra*, note 11, at 369, *n.* 1.

[17] *Bahin v. Hughes* (1886), 31 Ch. D. 390 (C.A.), at 395-96.

[18] *Chillingworth v. Chambers*, [1896] 1 Ch. 685 (C.A.).

The case law therefore provides for one of two results: equal contribution among trustees, or indemnification, either *in toto* by a fraudulent trustee, or trustee-solicitor, or, in the case of a trustee-beneficiary, to the extent of his beneficial interest.[19] There is no middle course. To date, equity has recognized only three situations in which the parity of position of those in breach will be altered in favour of indemnification. And, where one of those situations exists, whatever the merits of the case of the fraudulent trustee, solicitor-trustee, or trustee-beneficiary, the other co-trustees have a *right* to be indemnified. But, as Cotton L.J. has said, equity does not regard the list of indemnity situations as closed, and it is possible that further situations may be recognized in the future.

The developing state of the case law is revealed in a second feature of this branch of the law. The elements of two of the three existing indemnity situations – the fraudulent trustee and trustee-beneficiary – are not settled, and the position of a solicitor-trustee appears to be part of a wider principle that has not as yet been acknowledged by the courts.

With respect to the first indemnity situation, *Bahin v. Hughes* is authority for the proposition that the fraudulent trustee will only be required to indemnify his co-trustees where he has "got the money into his own hands, and made use of it".[20] The case suggests that the fraudulent trustee will be required to indemnify his fellow trustees only where a benefit has been acquired for himself.[21] If "use of" the trust money by the fraudulent trustee is an element, does that include not only use for his own benefit, but also use for the exclusive benefit of another? Traditionally, fraud itself has been regarded as the gravest offence. For this reason, the fraudulent trustee is barred from receiving any assistance from the court, and courts of Equity will not entertain a claim for contribution brought by one fraudulent trustee against another. Yet, is fraud enough to require the perpetrator to indemnify another whose breach arose from negligence? The case authorities afford no definite answer to these questions. Moreover, because of the provisions of the *Negligence Act*,[22] there is a question whether this common law indemnity rule still exists in Ontario, although the prevalent view is that the rule is not affected by that Act, which is generally regarded as concerned exclusively with tortfeasors.

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[19] See Waters, *supra*, note 10, at 854-56.

[20] *Supra*, note 17, at 395.

[21] *Ibid.*, at 395-96.

[22] *Negligence Act*, R.S.O. 1980, c. 315, s. 2. It is an arguable point whether statute has removed the rule in England. See Williams, *supra*, note 14, at 126-29, and Hanbury and Maudsley, *Modern Equity* (11th ed., 1981), at 646. In *MacDonald v. Hauer* (1976), 72 D.L.R. (3d) 110, [1977] 1 W.W.R. 51 (Sask. C.A.), no reference was made to the rule, although the liability *inter se* of two fraudulent co-trustees was under consideration. The rule survives in the United States: see Scott, *supra*, note 14, § 258.3, at 2213. See, also, Williams, *supra*, note 14, at 450-51, on the English *Law Reform (Married Women and Tortfeasors) Act, 1935*, 25 & 26 Geo. 5, c. 30. It should be noted that in England, as in Nova Scotia, New Brunswick, and Alberta, contributory negligence and tortfeasors' contribution liabilities are dealt with in separate statutes: see Alberta Institute of Law Research and Reform, Working Paper, *Contributory Negligence and Concurrent Tortfeasors* (March, 1975), at 1-5. In *Matheson v. Salah*, *supra*, note 2, Coffin J. permitted

With respect to the second indemnity situation, the liability of the solicitor-trustee to indemnify his liable co-trustees who acted as they did solely because of his advice, this appears to be part of a wider principle, recognized in the American Restatement on Trusts,[23] that the trustee who must indemnify his co-trustees is the one who is substantially more blameworthy. Section 258 of the Restatement provides as follows:

> 258.— Contribution or Indemnity from Co-trustee
>
> (1) Except as stated in Subsection (2), where two trustees are liable to the beneficiary for a breach of trust, each of them is entitled to contribution from the other, except that
>
> (a) if one of them is substantially more at fault than the other, he is not entitled to contribution from the other but the other is entitled to indemnity from him; or
>
> (b) if one of them receives a benefit from the breach of trust, the other is entitled to indemnity from him to the extent of the benefit; and for any further liability, if neither is more at fault than the other, each is entitled to contribution.
>
> (2) A trustee who commits a breach of trust in bad faith is not entitled to contribution or indemnity from his co-trustee.

In *Bahin v. Hughes*, as we have seen, Cotton L.J. explained the solicitor-trustee indemnity merely as a situation "which will justify the court" in treating the trustee as solely liable for the breach.[24] The true rationale for this indemnity, however, appears to be greater fault, as the American sources suggest. If it were causation, the co-trustees themselves would not have been liable initially for breach. Yet, if the wider principle of relative culpability[25] is the real basis for this type of indemnity, it is clear that adjusted contribution shares would better achieve this principle than an indemnity on all occasions. On the other hand, it has to be said that, in England to this date, only the solicitor-trustee has been required to indemnify in such circumstances, and that in Canada the position with respect to this indemnity situation is totally unexplored. There the matter stands.

The problem of personal benefit, discussed in connection with the case of the fraudulent trustee, also arises with the third indemnity situation, namely,

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defendants to proceed to trial joining third parties for breach of trust liability, and seeking from those third parties contribution or indemnity under the Nova Scotia *Tortfeasors Act*, R.S.N.S. 1954, c. 291, as amended (now R.S.N.S. 1967, c. 307). However, he made no allusion to the controversy or concerning the construction to be put upon the Act.

[23] American Law Institute, *Restatement of the Law, Second – Trusts 2d* (1959), § 258, at 650-51.

[24] *Supra*, note 17, at 396.

[25] The American rationale would logically be restricted to circumstances where the liability of each trustee in breach arises out of negligence.

where the beneficiary is also a trustee. In *Chillingworth v. Chambers*,[26] Lindley L.J. was of the view that it is irrelevant whether the trustee-beneficiary benefited personally from the breach. The fact that he is a beneficiary requires him to indemnify. On the other hand, Kay L.J. considered the acquisition of personal benefit to be a necessary factor, while A.L. Smith L.J. took no clear position. This case remains the leading authority on the scope of indemnity by a trustee-beneficiary, both in England and in the Commonwealth jurisdictions.

In one respect, however, a Saskatchewan decision has carried this indemnity situation further, in that a fraudulent trustee was held to be entitled to invoke it against an equally fraudulent co-trustee, who was also a beneficiary. In *MacDonald* v. *Hauer*,[27] one of three appointed co-trustees was left on his own to manage the trust property. Together with a friend, he engaged in a fraudulent scheme, which took the form of both parties trading with trust property for their personal, mutual, and unauthorized advantage. The friend thus became a constructive trustee, and so, like the appointed trustee, subject to the law of contribution and indemnity. Both trustees, one appointed, the other constructive, were fraudulent, and both had "made use of" the trust property for a common benefit. In an action against both of them for the loss caused to the trust, the appointed trustee was nevertheless ordered to indemnify the constructive trustee because of, and to the extent of, his (the appointed trustee's) beneficial interest in the trust. The point seems to be that the friend, the constructive trustee, had a right to indemnity notwithstanding the equally fraudulent nature of his own conduct.

(b) THE STATUTORY EXCUSING POWER

In 1896, the year in which *Chillingworth v. Chambers* was decided, Parliament at Westminster conferred upon the courts in England the statutory discretion to excuse trustees for breach of trust.[28] Today, this power is to be found in section 35 of the Ontario *Trustee Act*, and, as discussed in chapter 2, we have recommended the retention of this judicial discretion.[29] Pursuant to the statutory discretion, the court may relieve a trustee who is in breach of trust, either wholly or partly, from personal liability for the same, provided that he acted honestly and reasonably and ought fairly to be excused for the breach. Essentially, the courts are left to exercise their discretion on the basis of the facts in each case.[30]

The significance of this judicial discretion for present purposes is that, where there are co-trustees, it affords the court a means of adjusting the contribution that would arise ordinarily among trustees for breach of trust. For instance, the court can analyze the reasons for the loss to the trust, and find that some aspects of the events were caused by one trustee's conduct, while both trustees caused the remaining events to occur. It can also bring about an indemnity-type result by totally excusing one of the trustees. In *Fales, Wohlleben v. Canada Permanent Trust Co.*,[31] for example, the British Columbia Court of Appeal found an adjusted contribution to be appropriate between the individual trustee and the co-trustee, a trust company,[32] while the Supreme Court of Canada considered that the conduct of the trust company and the circumstances of the individual trustee justified a finding that resulted in the corporate trustee effectively indemnifying the individual trustee. In *MacDonald v. Hauer*, the Saskatchewan Court of Appeal would have excused totally two of the three appointed trustees, thus shifting the entire responsibility for making good the loss to the third appointed trustee and the constructive trustee.[33]

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[26] *Supra*, note 18.

[27] *MacDonald* v. *Hauer*, *supra*, note 22.

[28] *Judicial Trustees Act, 1896*, 59 & 60 Vict., c. 35, s. 3 (U.K.).

[29] See Draft Bill, s. 69.

[30] See *supra*, ch. 2, sec. 2(d).

In both cases, there is, indeed, a strong implication that the courts were thinking in terms of comparative blameworthiness. But, of course, the trustee who is to be excused must have acted honestly and reasonably; this discretionary power to excuse cannot therefore be used indiscriminately to bring about unequal contribution based upon relative culpability. Nevertheless, the excusing power has produced a new situation, which did not exist when the leading cases on contribution and indemnity among trustees were decided. Athough this aspect of the judicial excusing power is not discussed in the texts on the law of trusts[34] nor, it would appear, in any Commonwealth judgment, it seems to create a situation where, in many instances, equal contribution, adjusted contribution, or indemnity can be produced, according to the exercise of the discretion by the court in deciding on the merits of each case.[35]

3. REFORM IN ENGLAND

In 1977, in a Report entitled *Law of Contract, Report on Contribution*, the English Law Commission[36] recommended that legislation be introduced conferring upon any person who is liable in respect of damage suffered by another the right to recover contribution from any other person also liable in respect of the same damage. It proposed that the courts be enabled to assess the contribution in such cases on the basis of what is "just and equitable having regard to the extent of that person's responsibility for the damage" in question.[37] The Report also proposed that the courts be empowered to make any assessment, ranging from a total exemption from liability to contribute to requiring a party to provide a total indemnity.[38]

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[31] [1977] 2 S.C.R. 302, (1977), 70 D.L.R. (3d) 257, [1976] 6 W.W.R. 10. For a comment, see Waters, "Trusts and Trustees - A cause célèbre: Measure of Damages for Breach of Trust – Duties and Liabilities of Co-Trustees – Professional Trustees – Standard of Care" (1977), 55 Can. B. Rev. 342.

[32] *Fales, Wohlleben v. Canada Permanent Trust Co.* (1974), 55 D.L.R. (3d) 239, [1975] 3 W.W.R. 400 (B.C.C.A.).

[33] *MacDonald v. Hauer*, *supra*, note 22. The trial judge ([1973] 3 W.W.R. 484 (Sask. Q.B.), at 502-03) actually exercised the excusing power in favour of one of the appointed trustees, without such relief being sought.

[34] See Waters, "Liability Between Co-Trustees – Another Contest: *MacDonald v. Hauer*" (1977), 4 Estates Q. 12

[35] This assumes, of course, that the excusing power will be invoked by one or more of the co-trustees. In the *Fales* case, both the trust company and the widow sought to be excused. In *MacDonald v. Hauer*, the two levels of court volunteered that they would have exercised the power in favour of the uninvolved appointed trustees. In *Singlehurst v. Tapscott Steamship Co. Ltd.*, [1899] W.N. 133 (C.A.), it was said, however, that the section need not be specially pleaded, and this appears to have been the view of the trial and appeal courts in *MacDonald v. Hauer*.

[36] The Law Commission, *Law of Contract, Report on Contribution* (Law Com. No. 79, 1977) (hereinafter referred to as "English Contribution Report").

The Report recommended that no issue be permitted to arise concerning whether the claimant to contribution is liable under one head of legal obligation and the defendant under another. It was intended that the courts should be able to entertain and award contribution wherever it is equitable to do so. As a consequence, it would be immaterial whether the person against whom the claim was made was "liable in respect of a tort, breach of contract, breach of trust or on any other ground whatsoever" with regard to the damage in question.[39]

The following year, Parliament substantially adopted this Report in the *Civil Liability (Contribution) Act 1978*.[40] Its effect, among other things, is that, in any case where co-trustees are liable for breach of trust, the court may now adjust the contributions among those trustees in any proportions the court thinks "just and equitable". Another recommendation of the Commission was also adopted by the Act in section 7(3); that is, that the "common law rights of indemnity, where they existed, should be preserved".[41] Section 7(3) of the Act states that "any express or implied contractual or *other right* to indemnity"[42] is to be unaffected by the Act, and it also provides that the "right to recover contribution [under the Act] supersedes any right . . . to recover contribution (as distinct from indemnity) otherwise than under this Act in corresponding circumstances". This would appear to have the effect of abolishing among co-trustees the equity rule requiring equal contributions and replacing it by the new adjustment rule. Nonetheless, the three indemnity situations contained in the case law remain,[43] together with any other indemnity situation that the courts may in future prescribe, and any express or implied indemnity terms contained in the trust instrument.

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[37] *Ibid.*, at 34, s. 3(4) of the Draft Bill. This particular language was taken from the *Law Reform (Married Women and Tortfeasors) Act, 1935*, *supra*, note 22, s. 6(2).

[38] English Contribution Report, *supra*, note 36, at 34, s. 3(5) of the Draft Bill.

[39] *Ibid.*, at 38, s. 5(1)(*b*) of the Draft Bill.

[40] *Civil Liability (Contribution) Act 1978*, c. 47 (U.K.).

[41] English Contribution Report, *supra*, note 36, at 7, para. 26. The view of the Alberta Institute of Law Research and Reform, expressed in its Working Paper, *supra*, note 22, at 38, was also that the tort indemnity situations are "based on sound policy and have not caused difficulty".

[42] Emphasis added.

[43] In The Law Commission's Working Paper No. 59 on *Contribution* (1975), at 12, para. 20, *Bahin v. Hughes*, *supra*, note 17, is cited as an example of the undesirable state of the case law, permitting as it does only equal contribution or indemnity. See, also, the final English Contribution Report, *supra*, note 36, at 8, para. 28.

The Report does not discuss the subject of contribution and indemnity in the law of trusts, but only in the context of contract, tort, and quasi-contract, and the debates in Parliament cast no further light on the matter. Accordingly, it does not appear that the Commission and Parliament turned their minds, for example, to the issue whether the case law indemnity situations should be retained in the law of trusts in particular. On the other hand, although no mention is made in the Report of the judicial excusing power contained in the English *Trustee Act, 1925*, it would seem quite clear that any calculation of contribution among trustees in the future will be made expressly under the *Civil Liability (Contribution) Act 1978*. It would appear to be the case, however, that a trustee who has the right to an indemnity under the case law may assert it, and thus oust the jurisdiction of the court to make a "just and equitable" contribution assessment, even though the court may consider the latter course more appropriate.

4. CONCLUSIONS

There are essentially three alternatives that might be adopted. The first involves the retention of the principle of equal contribution obligations among trustees for breach of trust, save for an indemnity in the three circumstances established by the case law and such further case law situations as may develop. The second approach would be that of the English *Civil Liability (Contribution) Act 1978*, namely, a statutory contribution obligation whereby the liability of each co-trustee found responsible would be in proportion to his relative culpability, plus the retention of the present case law indemnities. The third alternative also involves adjusted contributions among trustees proportionate to their relative responsibility; however, the right to any indemnity otherwise at law would be abolished. In this last approach, an indemnity obligation would occur either where the court determined that a co-trustee should be able to look to no other trustee for a contribution, or where the trust instrument contained an express provision dealing with indemnity among the trustees.

The first alternative would require no substantial change in the law, but advantage could be taken of the redrafting of the *Trustee Act* to remove the uncertainties of, and to rationalize, the existing indemnities. The American Restatement[44] accomplishes both objectives, so far as this is possible, and is generally accepted as representing the existing law in the United States.[45] An obligation to indemnify would arise if a co-trustee committed a breach of trust "in bad faith".[46] Self-benefit would usually be the object of the trustee's conduct, but it would not be a necessary element. A second obligation to indemnify would arise where one trustee is "substantially more at fault" than the others.[47] This is the rationalization of the solicitor-trustee obligation to indemnify. The third obligation to indemnify would take the element of self-benefit and make it the ground for an independent obligation; one who has received a benefit would indemnify his fellows to the extent of that benefit.[48] Once he has so indemnified his co-trustees, the benefiting trustee would have a right of contribution for any remaining loss, unless another indemnity obligation also applies. It will be noted that the theme of all three obligations is the improper conduct of the obligated trustee. A trustee does not have the obligation to indemnify just because he is also a beneficiary. In *MacDonald v. Hauer*,[49] for instance, the fraudulent, appointed trustee-beneficiary would not have had the obligation to indemnify his equally fraudulent friend, the constructive trustee, just because of the former's beneficial interest, and therefore to the extent of that interest.

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[44] *Supra*, note 23.

[45] See Scott, *supra*, note 14, § 258.1-3, at 2210-2213.

[46] *Supra*, note 23, § 258(2).

[47] *Ibid.*, § 258(1)(a).

However, it would appear that, in the United States, as under the present law in Ontario, equal contributions are due unless a trustee's right to contribution from his co-trustees is replaced by a duty to indemnify them. The result of this position is that the existence of a duty to indemnify turns upon the meaning of "bad faith", "substantially more at fault", and receipt of "a benefit". Does wilful default constitute "bad faith" or will mere negligence suffice? Does a wilful encroachment upon capital by the active trustee in favour of a needy life tenant, when there is no power in the instrument to encroach and the co-trustee has not paid sufficient attention to realize what is happening, give rise to an obligation by the active trustee to indemnify the inactive trustee? And what amount of self-benefit is needed in order to call the duty to indemnify into effect?

These problems would admittedly lose much of their significance if adjusted contributions were possible among the liable co-trustees, decided in relation to what is "just and equitable", and this is where the recent changes to the law of contribution in England have become significant. On the other hand, if we are correct in our conclusion that the three case law indemnity situations remain in effect in England, the question arises whether any trustee should retain the right to be indemnified where the court is enabled to adjust the contribution obligations to reflect the actual merits among the liable co-trustees. Indeed, is there any case for retaining such rights of indemnity when adjusted contributions to the point of indemnification are available?

When one considers that the statutory excusing power already permits the courts in Ontario, as in all the Canadian common law provinces, to adjust the burden of financial liability as among trustees to a significant degree, it is evident that a new direction is already with us. The indemnities of the case law reflect a nineteenth century attempt on the part of the courts to correct the inequities that flow from the equal contribution obligation. The judicial excusing power has begun the process of rendering these attempts unnecessary.

The third course of action therefore has a ready appeal. It resembles the English reform, but would abolish the three case law indemnities together with the power of the courts under the case law to define further situations where a trustee has a right to be indemnified. However, it could be said that, whatever the merits of this approach, it replaces a right to an equal contribution from each solvent and liable co-trustee, and a right to a complete indemnity in specific circumstances, with the uncertainties of outcome associated with a discretion in the court to allocate the burden of liability among co-trustees in each case according to the particular merits of the parties as perceived by the court.

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[48] *Ibid.*, § 258(1)(b).

[49] *MacDonald v. Hauer*, *supra*, note 22.

We do not find this objection persuasive. Rather, we agree with The Law Commission in England that, where damages are concerned, as opposed to debt, a judicial discretion to determine what is "just and equitable" between the co-defendants does not give rise to the undesirable uncertainties that might arise from a reallocation between parties of liability *inter se* for the repayment to the creditor of a debt, which is a predetermined amount.[50] Moreover, we have already shown that the elements and applicability of the three existing case law indemnity situations are not yet settled in Anglo-Canadian law, so that the "specific circumstances" in which equity permits indemnity are not in fact entirely clear. Nor, finally, can one overlook the broad discretion conferred upon the courts by the statutory excusing power, a power whose existence and form we have otherwise found to be a useful feature of the *Trustee Act*. To give the courts an explicit discretion to adjust contributions would be to provide a complement to the judicial excusing power. The latter is really concerned with technical breach, whether committed by a co-trustee or a sole trustee who has acted reasonably and in good faith, and should not, in our view, be used as an indirect means of adjusting contribution among trustees.

A further consideration is whether, instead of the revised *Trustee Act* providing for contribution in the case of breach of trust, it would be preferable for Ontario to have one Act dealing with contribution among liable parties, whatever be the obligation whose breach has given rise to the claim for damages by the injured person.[51] The English Law Commission, and subsequently Parliament at Westminster, favoured the latter approach. As we previously noted, the English Commission was anxious that the courts should not be prevented in any case from adjusting the contribution liabilities between plaintiffs and defendants, or co-defendants, because those parties were in breach of different legal obligations.

The Alberta Institute of Law Research and Reform arrived at a conclusion different from that of the English Law Commission concerning the location of provisions dealing with contribution among trustees. In its *Report on Contributory Negligence and Concurrent Wrongdoers*, the Institute concluded that "the right of contribution which is currently available as between trustees is somewhat defective. We think, however, that a provision concerned with contribution between trustees should appear in The Trustee Act".[52] The Institute deferred to a subsequent report any recommendation concerning contribution among trustees.

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[50] English Contribution Report, *supra*, note 36, at 8, para. 29.

[51] As noted previously, the *Negligence Act*, *supra*, note 22, s. 2, may not be this embracing.

[52] Institute of Law Research and Reform, Report No. 31, *Contributory Negligence and Concurrent Wrongdoers* (April, 1979), at 52.

In principle, we can see the merit of the English position, but it is significant that in its Report, as well as in the Working Paper that preceded the Report,[53] the English Commission's examples and comments are couched wholly in terms of contractual, quasi-contractual, and tortious obligations. It is the interrelationship of these areas of the law that would appear to be essentially served by the enactment of a single Act. Breach of trust, as an obligation recognized solely in Equity courts, has had a separate existence and operation from common law obligations. Indeed, if T, a trustee, and X, a stranger to the trust, are in any way involved in circumstances where T's conduct would be a breach of trust, it is difficult to imagine a situation in which X would not also be liable as a trustee *de son tort* (or constructive trustee).[54] We are not aware of any reported instance in which T and X would not both be liable as trustees.[55]

For these reasons, therefore, we do not see why the revised *Trustee Act* should not carry an adjustment of contributions provision solely for breach of trust based upon the relative culpability of each liable trustee, and we recommend that such a provision be incorporated in the revised *Trustee Act*.[56]

The legislation that we propose would enable the courts to apportion liability among liable co-trustees simply if there has been a "breach of trust" on the part of each. This means that breach arising out of wilful wrongdoing, as well as negligent wrongdoing, would be brought within the legislation, and it would be no bar to the court's discretion if one trustee had intentionally harmed the trust, while another was merely negligent.

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[53] *Supra*, note 43.

[54] For trusteeship *de son tort*, see Waters, *supra*, note 10, at 341-42.

[55] Williams, *supra*, note 14, at 126 and 458, gives, as an example of a trustee and a stranger, X, causing actionable loss to the trust, the situation where through the negligence of both parties a house belonging to the trust is burnt down. T, the trustee, is liable for a breach of trust to B, the beneficiary; and X is liable as a tortfeasor to the trust, an obligation which will be enforced in an action brought by T as trustee. But T is not a tortfeasor, either *vis-à-vis* B, or therefore X. It follows that, if T sues X for the whole loss, X will have no right of contribution from T whose personal negligence is irrelevant. If B successfully sues T for the whole loss, T in turn, not being a tortfeasor, will have no means of securing a contribution from X.

But in nine out of ten such cases, X's degree of involvement with the trust property would make him a trustee *de son tort*, and, as we have seen, a constructive trustee is subject to the law of contribution and indemnity as between trustees. It is admittedly possible for one person to become a constructive trustee, in the total absence of any express trust, and for another also to be in breach of an obligation arising out of the same events, but not be a constructive trustee. However, the likelihood of such a situation occurring is sufficiently small that to withhold a contributions provision from the *Trustee Act* on this account seems out of proportion.

[56] At present, the Commission has on its programme a project dealing with contribution among wrongdoers, which will examine the law respecting the allocation of responsibility between two or more persons whose conduct has caused the same injury, as well as the law relating to contributory negligence, which also involves the apportionment of loss. However, pending the completion of that project, we are of the view that recommendations concerning contribution among trustees should be made in the context of this Report, and included in the revised *Trustee Act*.

Accordingly, we recommend that, subject to any express limitation of liability in the trust instrument or to any express provision in the trust instrument as to contribution or indemnity, the proportions in which co-trustees in breach of trust are liable as between themselves for making good the loss to the trust, or the amount of contribution that may be recovered by a trustee from any co-trustee, should be such as may be found by the court to be just and equitable having regard to the extent of the responsibility of each trustee in breach for the loss caused.[57] We further recommend that the court should be able to exempt a trustee from liability to make contribution or to order that any contribution due to, or to be recovered from, a trustee amounts to a complete indemnity.[58] In addition, we recommend that the revised *Trustee Act* should state expressly that "breach of trust" includes any act or omission, whether intentional or negligent, giving rise to liability of a trustee to the trust beneficiaries.[59]

We would also abolish the rule, if it still exists in Ontario, that, if there are two or more fraudulent trustees, the court will not compel contribution as between those parties. We are of the view that the court, in its discretion, should determine what is the most appropriate order in the particular circumstances. Accordingly, we recommend that the powers conferred upon the court to order contribution among co-trustees based upon the extent of responsibility of each trustee should be exercisable even where both the trustee claiming contribution and the trustee against whom the claim is made have acted fraudulently in breach of trust.[60] We also recommend that, where a trustee in breach of trust is insolvent, the court should apportion the cost of making good the loss to the trust and any further damages among the solvent co-trustees as it considers appropriate.[61]

We would also retain the power, contained, at present, in section 34(1) of the *Trustee Act*, whereby the court may impound all or any part of the interest of a beneficiary who has instigated, requested or consented to the breach of trust by the trustee by way of indemnity to the trustee or person claiming through him. Accordingly, we recommend that, where trustees commit a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the court should be able to make an order impounding all or any part of the interest of the beneficiary in the trust estate by way of contribution or indemnity to the trustees or persons claiming through them.[62]

If the above recommendations are adopted, we are of the view, for the reasons stated, that the right to indemnity at common law and, in particular, the three case law indemnities, should no longer be available. Accordingly, we recommend that no trustee should be obligated or required by the court to make contribution to or to indemnify a co-trustee, except as provided by our recommendations.[63] As indicated, our recommendations are subject to any express limitation of liability expressed in the trust instrument, or to any provision in the trust instrument as to contribution and indemnity.[64]

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[57] Draft Bill, s. 54(1).

[58] *Ibid.*, s. 54(2).

[59] *Ibid.*, s. 54(3).

[60] *Ibid.*, s. 54(4).

[61] *Ibid.*, s. 54(5).

[62] *Ibid.*, s. 55.

We would not abolish joint and several liability among co-trustees. In view of the fiduciary nature of the trustee's office, we think there should be no doubt that a trustee is personally liable for breaches of trust, and that he can be asked to shoulder the entire loss incurred by the trust. It should not lie in his mouth, any more than it does at present, to say that the trust beneficiaries should bear the loss of the share of compensation of the trust owed by a trustee who is insolvent or absent leaving no assets. Nor, of course, should the trustee be beyond litigation once the trust beneficiaries bring action against a liable co-trustee. On the other hand, he is entitled to say that, if the beneficiaries have settled with one or more trustees on certain terms, he should only have to contribute on the basis of what the court considers a reasonable settlement figure. This provision is reflected in the Ontario *Negligence Act*,[65] and we would adopt it here. Accordingly, we recommend that the revised Act should provide that, where the beneficiaries have settled with a trustee in breach of trust and that trustee subsequently seeks contribution from a co-trustee, the court, in making any contribution order, should determine whether the settlement figure is reasonable.[66]

We are of the view that, because of the nature of changes in the present law that would be effected by our recommendations for contribution and indemnity among trustees, special transitional provisions are required. Accordingly, we recommend that these recommendations should not apply in proceedings for breach of trust commenced before the revised Act comes into force.[67] In addition, we recommend that nothing in these recommendations should affect any judicial determination as to liabilities for contribution and indemnity when that determination was made before the revised Act comes into force.[68]

Finally, we wish to note a matter that, while not related directly to contribution and indemnity among trustees, does concern the extent of liability of trustees, namely, where a trustee acts for more than one trust. In this circumstance, we are of the view that it should be clear that, in the absence of fraud, a trustee acting for more than one trust should not be affected by notice of any matter if he has obtained that notice merely because he is acting as trustee of another trust. We would adopt a provision to this effect that appears in the English *Trustee Act, 1925*[69] and in several of the Australian Trustee Acts.[70] Accordingly, we recommend that a trustee acting for more than one trust, or as a personal representative of an estate, should not, in the absence of fraud, be affected by notice of any instrument, matter, fact or thing in relation to any particular trust if he has obtained that notice merely by reason of his acting or having acted for the purposes of another trust or estate.[71]

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[63] *Ibid.*, s. 54(7).

[64] *Ibid.*, s. 54(1).

[65] *Supra*, note 22, s. 3.

[66] Draft Bill, s. 54(6).

[67] *Ibid.*, s. 54(8).

[68] *Ibid.*, s. 54(9).

[69] 15 & 16 Geo. 5, c. 19, s. 28 (U.K.)

[70] See, for example, Queensland *Trusts Act 1973*, Queensl. Stat. 1973, No. 24, s. 69, and Western Australia *Trustees Act, 1962*, W. Austl. Acts 1962, No. 78, s. 68.

RECOMMENDATIONS

The Commission makes the following recommendations:

1. The present law whereby co-trustees in breach of trust have an obligation to contribute equally among themselves to the cost of making good the loss resulting from breach of trust should be abolished . In its place, the revised *Trustee Act* should provide an adjustment of contributions provision based upon the relative culpability of each liable trustee.

2. The revised *Trustee Act* should provide that, subject to any express limitation of liability in the trust instrument or to any express provision in the trust instrument as to contribution or indemnity, the proportions in which co-trustees in breach of trust are liable as between themselves for making good the loss to the trust, or the amount of contribution which may be recovered by a trustee from any co-trustee, are such as may be found by the court to be just and equitable having regard to the extent of the responsibility of each trustee in breach for the loss caused.

3. The revised *Trustee Act* should provide that the court may exempt a trustee from liability to make contribution or may order that any contribution due to, or to be recovered from, a trustee shall amount to a complete indemnity.

4. The revised *Trustee Act* should provide that, for the purposes of Recommendation 2, "breach of trust" includes any act or omission, whether intentional or negligent, giving rise to liability of a trustee to the trust beneficiaries.

5. The revised *Trustee Act* should provide that the powers conferred on the court to order contribution among co-trustees based upon the extent of responsibility of each trustee are exercisable even where both the trustee claiming contribution and the trustee against whom the claim is made have acted fraudulently in breach of trust.

6. The revised *Trustee Act* should provide that, where a trustee in breach of trust is insolvent, the court may apportion the cost of making good the loss to the trust and any further damages among the solvent co-trustees as it considers appropriate.

7. The revised *Trustee Act* should provide that, where trustees commit a breach of trust at the instigation or request or with the consent in writing

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[71] Draft Bill, s. 53.

of a beneficiary, the court may make an order impounding all or any part of the interest of the beneficiary in the trust estate by way of contribution or indemnity to the trustees or persons claiming through them.

8. The right to indemnity at common law and, in particular, the three case law indemnities, should no longer be available. Accordingly, the revised *Trustee Act* should make it clear that no trustee should be obligated or required by the court to make contribution to or to indemnify a co-trustee, except as provided by our recommendations.

9. Trustees should continue to be jointly and severally liable for breaches of trust. However, the revised *Trustee Act* should provide expressly that, where the beneficiaries have settled with a trustee in breach of trust and that trustee subsequently seeks contribution from a co-trustee, the court, in making any contribution order, may determine whether the settlement figure is reasonable.

10. The revised *Trustee Act* should provide that the above recommendations do not apply in proceedings for breach of trust commenced before the revised Act comes into force.

11. The revised *Trustee Act* should provide that nothing in the above recommendations affects any judicial determination as to liabilities for contribution and indemnity when that determination was made before the revised Act comes into force.

12. The revised *Trustee Act* should provide that a trustee acting for more than one trust, or as a personal representative of an estate, is not, in the absence of fraud, affected by notice of any instrument, matter, fact or thing in relation to any particular trust if he has obtained that notice merely by reason of his acting or having acted for the purposes of another trust or estate.

CHAPTER 7

VARIATION AND TERMINATION OF TRUSTS

1. INTRODUCTION

Most, if not all, instruments that create trusts set out the terms upon which the beneficiary or beneficiaries are to enjoy the gift, and confer upon the trustees certain administrative and dispositive powers to enable them to fulfill these terms. The terms of a trust, as we have seen by way of examples in previous chapters of this Report, may be complex, involving numerous beneficiaries and extensive discretionary trustee powers, or they may be relatively simple. Whatever the nature and extent of the trust terms, however, once the trustees have carried out all their obligations as specified by the trust instrument, the trust terminates. A termination is the coming to a close of a trust, and it normally involves the distribution of the trust capital to beneficiaries who take absolutely.

Nonetheless, before a trust has run its natural course the trustees or, indeed, the beneficiaries may wish to see one or more of the trust terms varied, in order to accommodate, for example, changed circumstances. Alternatively, the beneficiary or beneficiaries may wish to terminate the trust entirely before the terms of the trust have been fulfilled. Such a premature termination of the trust may be desired for numerous reasons, not the least of which being the desire to have the immediate enjoyment of the entire gift that is being held under the terms of the trust.

At present, in Ontario, there are two routes available to trustees and beneficiaries who wish to vary or to terminate prematurely the terms of a trust. At common law, under a rule known as the "rule in *Saunders v. Vautier*",[1] a beneficiary may, in certain circumstances, terminate a trust prematurely without the approval of the court. Secondly, where the common law is not applicable, beneficiaries and trustees may avail themselves of the *Variation of Trusts Act*,[2] in order to vary or to revoke the trust with the approval of the court under the circumstances provided for in that Act. The issue that we shall discuss in this chapter is whether the present mechanisms available for the variation and termination of trusts are satisfactory to the task, or whether reform in this area of the law should be considered.

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[1] *Saunders v. Vautier* (1841), 4 Beav. 115, aff'd Cr. & Ph. 240, 41 E.R. 482.

[2] *Variation of Trusts Act*, R.S.O. 1980, c. 519.

We turn to examine first the operation of the variation of trusts legislation, and secondly the rule in *Saunders v. Vautier*.

2. PRESENT LAW

(a) THE *VARIATION OF TRUSTS ACT*

The *Variation of Trusts Act* was adopted in Ontario in 1959,[3] and followed the provisions of the Act of the same name enacted in England in 1958.[4] Pursuant to this Act, the Supreme Court of Ontario is empowered to consent to a variation or revocation of any trust on behalf of those beneficiaries who are minors, unascertained as members of a class or description, unborn, or contingently entitled after a protected prior estate. The Act requires that an "arrangement" be put before the Court setting out the proposed terms of the variation or revocation of the trust in question. An arrangement may be originated by any person, but, in effect, must be acceptable to all the adult, ascertained, and capable beneficiaries.[5] The Court will then give or refuse its consent according to whether it is of the view that the proposed terms are for the benefit of the minors, the unascertained, and the unborn,[6] and whether, in its discretion, "it thinks fit" in the circumstances to approve the arrangement on behalf of those persons.[7]

The Act expressly enables the Court to entertain proposals "varying or revoking all or any of the trusts or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts".[8] Accordingly, the Court has the power to approve an alteration of any term of the trust, whether it be administrative or dispositive, and the power to approve a premature termination of the trust. This language has been construed as giving the Court a wide jurisdiction, covering any aspect of the trust, including the quantum of the beneficial interests.

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[3] *The Variation of Trusts Act, 1959*, S.O. 1959, c. 104. For a full account of this type of legislation, and the case law on the subject, see Mowbray (ed.), *Lewin on Trusts* (16th ed., 1964), at 738-48; Hayton (ed.), *Underhill's Law relating to Trusts and Trustees* (13th ed., 1979), at 387-407; and Waters, *Law of Trusts in Canada* (1974), at 911-26.

[4] *Variation of Trusts Act, 1958*, 6 & 7 Eliz. 2, c. 53 (U.K.). This legislation was enacted in England following the publication in November, 1957, of the Law Reform Committee, Sixth Report, *Court's Power to Sanction Variation of Trusts* (Cmnd. 310, 1957).

[5] If any adult beneficiary (other than those on behalf of whom the Court may consent) refuses to accept the proposals, this will prevent their implementation. The refusing beneficiary is entitled to "stand on his rights" under the trust instrument.

[6] *Variation of Trusts Act*, *supra*, note 2, s. 1(2).

[7] *Ibid.*, s. 1(1). It should be noted that, while the Court may approve an arrangement if "it thinks fit" on behalf of any person contingently entitled after a protected prior estate under s. 1(1)(*d*), it need not consider whether the arrangement is "for the benefit of that person" under s. 1(2) of the Act.

[8] *Ibid.*, s. 1(1).

For instance, with respect to the variation of administrative provisions, the Court may be asked to approve the substitution of a power of sale for a trust for sale, or the deletion of any obligation or power to sell the original trust assets. As for dispositive provisions, judicial approval may be sought for a new clause to include in a class of existing grandchildren, a grandchild born after the instrument of gift took effect; in such a case, the parents would be obliged to demonstrate to the Court that the testator did not intend to exclude any grandchild, and that failure to approve the variation would actually be to the disadvantage of the existing grandchildren within the class, because of the disharmony and jealousy the gift would generate within the family. While the Court is normally asked to consider whether there is financial benefit for the unborn, unascertained, and incapacitated, decisions indicate that the Court will accept social factors, such as family accord, as supplying the required "benefit".[9] Similar considerations are applicable where the application under the *Variation of Trusts Act* involves a request that the trust be revoked before it has run its course.

The power conferred upon the Supreme Court of Ontario by the *Variation of Trusts Act* would clearly complement the provision, recommended previously,[10] that would enable the court to confer additional powers upon trustees in relation to their dealings with the trust property. For the purpose of that power, the trustees themselves are the obvious persons to apply to the court for any additional administrative authority that they feel they should possess.

Under the *Variation of Trusts Act*, on the other hand, it is usually the adult beneficiaries who will bring the proposed arrangement before the Court, particularly where beneficial interests are to be varied or the trust terminated. In those circumstances, the Court will look to the trustees to take a neutral position. Moreover, as we have earlier noted, the jurisdiction that we have recommended previously for inclusion in the revised *Trustee Act*, whereby the court may give additional administrative powers to the trustees, does not require the court to consider the benefit of each incapacitated beneficiary. Nor is the consent of each adult beneficiary required before the court will confer an additional requested power upon trustees.[11] Such considerations are not really necessary where the court is merely concerned with efficient trust administration; the benefit of all the beneficiaries would be an underlying consideration in all such applications. Where, for example, the court is asked to grant the power to invest in one particular company, the courts in England have considered that the judicial authorization to grant additional administrative powers under the *Trustee Act, 1925*[12] is the appropriate route.[13] Where, however, the beneficiaries' interests could be significantly affected, as in the instance where an unlimited power of investment is being sought, an application under the *Variation of Trusts Act* might be more appropriate.

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[9] See *Re Tweedie Estate* (1976), 64 D.L.R. (3d) 569, [1976] 3 W.W.R. 1 (B.C.S.C.), and *Re Remnant's Settlement Trusts*, [1970] Ch. 560, [1970] 2 All E.R. 554.

[10] See *supra*, ch. 4, sec. 3(e), and Draft Bill, s. 63.

[11] See *ibid.*, s. 63.

[12] *Trustee Act, 1925*, 15 & 16 Geo. 5, c. 19 (U.K.).

[13] See *Underhill's Law relating to Trusts and Trustees*, *supra*, note 3, at 409-11.

(b) The Rule in *Saunders v. Vautier*

At common law, under the rule in *Saunders v. Vautier*,[14] a beneficiary may, in certain circumstances, terminate a trust prematurely without the approval of the court. A termination, as we have stated, is the coming to a close of a trust, and it normally involves the distribution of the trust capital to beneficiaries who take absolutely. The termination is premature when the trust is brought to a close before the terms of the trust have run their natural course. For instance, A may leave his residuary estate on trust for B, his wife, for her life, the capital to be divided equally among A's three children, X, Y, and Z, on B's death. During B's widowhood, she and the three adult sons may agree on a mode of distribution of the capital (each son will take a third of the capital less the actuarial value of B's interest, B taking that capitalized sum), which requires the trustees to distribute accordingly, and gives the trustees a release from further liability to the beneficiaries. The point we wish to underline is that this can be done without invoking the aid or the consent of the court.

The decision in *Saunders v. Vautier* has been expressed in the following manner: "[w]here there is an absolute vested gift made payable at a future event, with a direction to accumulate the income in the meantime and pay it with the principal, the court will not enforce the trust for accumulation, in which no person has any interest but the legatee".[15] For instance, a will may leave a capital sum to X with the direction that the sum is to be paid to him on his twenty-fifth birthday. In the meantime, the capital is to be invested, and the annual income is to be accumulated, being added to capital at the end of each year. The trustee is given a power to make payments out of income arising in any year and apply it, or if X is of age, pay it to X, for his maintenance. The decision in *Saunders v. Vautier* provides X, on his coming of age, with several alternatives: X is entitled to terminate the trust and to have the capital and the accumulations to date paid over to him; he may choose to keep the trust in place, but to take the accumulations to date and have the income paid to him as it arises; or he may take the accumulations to date, and continue with the trust until he attains his twenty-fifth birthday with income accruing to the capital until that time.

The scope of the rule in *Saunders v. Vautier* is, however, wider than this.[16] It also means that, where there are two or more beneficiaries, and whether any beneficiary has only a concurrent or successive, defeasibly vested or contingent interest, they can all agree to wind up the trust without reference to the intent of the settlor. There is, nevertheless, one proviso: namely, that all possible, as well as vested, beneficiaries must be parties to the agreement, and to be effectively a party to the agreement each must be capable. The example we earlier gave of the widow, life tenant, and her three sons is an illustration of this broader scope of the rule.

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[14] *Supra*, note 1. For a full discussion of the rule, and its operation in Canada, see Waters, *supra*, note 3, at 812-29.

[15] Cretney and Dworkin, *Theobald on Wills* (13th ed., 1971), para. 1554, at 568.

[16] *Underhill's Law relating to Trusts and Trustees*, *supra*, note 3, at 141.

(i) The Reasoning Behind the Rule

The common law rule with respect to the premature termination of trusts is much older than the decision in *Saunders v. Vautier*. It goes back at least to 1727,[17] and, therefore, has its roots in the early foundation days of the modern law of trusts. The rule is based upon the principle that, if a person is solely and absolutely entitled to the trust property, he may enjoy that property in any way he chooses, and he is so entitled when all possible interests in the property, now and in the future, are his. Once that person is both mentally capable and of age, he is able to assert his right to choose the manner in which he will enjoy the property.

At law and in equity, no restraint on alienation may be imposed upon an absolute owner in the enjoyment of his interest.[18] That is to say, there may be no direction that a man's interest shall not be assigned or encumbered by him. Similarly, at law and in equity, there may be no restraint on anticipation, or, in other words, no direction that the interest of a sole beneficiary shall not be paid to him before a certain time.[19] The precept of law and of equity is simple: you cannot transfer property to another, whether further to contract or gift, and then tell the other how he is permitted to enjoy the transferred property. Personal obligations as to the mode of enjoyment may be imposed upon the transferee, and this can be done by way of contract for value. However, if all the interest in the property is transferred, you cannot control what the transferee chooses to do with it.

This reasoning applies whether one person has the absolute interest in property, or several persons together have that interest. It is the character of ownership that is of central importance. The law allows the owner, whether he be one or several persons, to ignore the transferor's dictates as to alienation, encumbrancing, and how the income and capital shall be enjoyed. Moreover, the law is consistent; whether the transferor conveys the property in his lifetime or by will, and whether he conveys it outright or on the terms of a trust, the precept applies.

(ii) Circumstances in Which the Rule Operates and the Effect of its Operation

The existence of the rule in *Saunders v. Vautier* is well established, and, where it applies, it is clear that beneficiaries do not need to seek the assistance of the court to terminate the trust. Litigation has arisen because, almost invariably, there is a difference of opinion, or at least sufficient doubt, as to the meaning of the trust instrument, and the court is asked whether circumstances exist that attract the application of the rule.

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[17] *Love v. L'Estrange* (1727), 5 Bro. 59, 2 E.R. 532 (H.L.).

[18] For a full discussion of the history of the doctrine of restraint on alienation, see *Blackburn and Cox v. McCallum* (1903), 33 S.C.R. 65. Somewhat surprisingly, given this hostility to restraints, the courts have tolerated partial restraints: see *Re Macleay* (1875), L.R. 20 Eq. 186 ("on condition that he never sells out of the family"). See, also, *supra*, ch. 5, sec. 4, and *Re Brown*, [1954] 1 Ch. 39, [1953] 2 All E.R. 1342.

[19] The so-called "restraint on anticipation", which at one time might be imposed upon a married woman, might also be characterized as a restraint on alienation. It was designed by equity against the background of eighteenth century well-to-do English society to protect the married woman, who was to own property in her own right, from the pressures of her husband to alienate the property in his favour: see Baker and Langan, *Snell's Principles of Equity* (28th ed., 1982), at 523. This restraint has now been abolished in Ontario: see *The Family Law Reform Act, 1975*, S.O. 1975, c. 41, s. 6, repealing *The Married Women's Property Act*, R.S.O. 1970, c. 262, s. 4(2).

Of course, the intention of the majority of settlors or testators is clearly that the gift held on trust shall be enjoyed in a manner that involves a period of time before absolute interests vest in possession. The beneficiary or beneficiaries, on the other hand, may be of the view that, on a proper construction of the trust instrument, the absolute interest or interests vest in interest at once, so that the rule in *Saunders v. Vautier* applies and the intentions of the settlor or testator can be avoided. The trustees of the testator or settlor may also have been advised that the rule applies or may apply, but may not have received any representations on this matter from the beneficiary or beneficiaries. If there is no doubt that the rule applies, the trustees have the difficult problem of whether they should volunteer the information to the beneficiaries.[20] If there is doubt, the trustees may feel obligated to seek a construction of the trust instrument from the court.

The reported cases appear to reveal six situations in which the common law rule has been significant. Each of the six situations we shall discuss reveals that a reasonably competent draftsman can easily prevent the common law rule from applying. If the rule does not apply, and assuming there is an unascertained, minor, or incapacitated beneficiary, beneficiaries wishing to terminate the trust must apply to the court for approval of a terminating arrangement under the *Variation of Trusts Act*. Since, under the Act, any such arrangement must provide a benefit for every possible beneficiary, whether ascertained or not, minor or unborn, there is a price to be paid for the judicial approval. The court must consider what persons might in future acquire vested interests, and see what trust property set aside for those persons represents at least a fair quantification of the possible benefits that the future might have brought. Some courts have expressly taken the view that, if the arrangement is truly to be for the benefit of the minors, unborn, and unascertained, as the Act requires, the arrangement must be generous in estimating the possibilities and, therefore, in awarding an appropriate compensation.

In order to make certain that the *Variation of Trusts Act* is the only recourse for beneficiaries seeking a premature termination, the draftsman must ensure that, in the case of a sole beneficiary, the interests created by the instrument are contingent or, where there is more than one beneficiary, that there are unascertained or minor beneficiaries. As we noted earlier, provided all possible beneficiaries are ascertained and capable, they can wind up the trust at their will. It matters not whether some of the beneficiaries' interests are vested in interest but not in possession, vested but defeasible, or contingent.

This means that, even where the settlor takes considerable care to distribute his trust fund among the members of his family so that each receives the benefits that the settlor considers appropriate, if he does not ensure that there will be unascertained or minor beneficiaries while the purposes he has in mind are taking effect, the beneficiaries can get together and frustrate his purposes when all are ascertained and the youngest comes of age. Whatever care has been taken to choose the most suitable trustee to administer the property, and whatever sound family protection planning has gone into providing powers of maintenance and advancement and encroachment upon capital, all will be in vain if the beneficiaries choose to do away with the trust and take instead agreed shares of the capital. If the trust is *inter vivos*, the settlor can reserve a power of revocation so that he retains control, but the great majority of trusts in Canada are testamentary, and, in this case, a power of revocation by the testator is not available. Moreover, even if the trust is *inter vivos*, the tax consequences of a reservation of a power of revocation are sufficiently far-reaching that a trust with such a power is hardly ever worth creating.

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[20] Samuels, "Must the Trustees Tell the Beneficiary about Saunders v. Vautier?" (1970), 34 Conveyancer (N.S.) 29.

Where there is only one beneficiary, who seeks to take advantage of the rule, however, it is only where the interest is vested in interest, but delayed as to vesting in possession, that the common law rule applies.[21] It is clear that, under these circumstances, the rule will apply in only a limited number of cases, which we now turn to consider.

To take the first three situations in which the rule in *Saunders v. Vautier* may be invoked, the testator may have postponed the sole beneficiary's interest to an age in excess of majority. Alternatively, the testator may have desired to postpone the beneficiary's interest in possession to a future date, occurring some time after the trust instrument takes effect. Finally, the testator may have directed that the gift was to be paid to the beneficiary in instalments.

As to the first circumstance, the trustees in *Re Squire*[22] were to hold certain realty on trust for A until he reached the age of thirty, and upon his reaching that age to convey the realty to him together with the accumulated rents and profits. Out of those rents and profits and, if necessary, out of the proceeds of the sale of capital, the trustees had the power until A reached that age to pay up to $700 *per annum* for the maintenance and higher education of A. Since the testator had not made the gift of the land contingent on A attaining thirty, but had instead vested the land and its income absolutely in A, subject to a delayed vesting in possession, A was held entitled to the land itself on his coming of age. Had the draftsman made the gift of the land contingent, with a gift over to A's children, for instance, should A not attain thirty, an application to the court under the *Variation of Trusts Act* would, today, have been necessary if A wished to terminate the trust before he reached the age of thirty.[23]

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[21] Nor can the rule be invoked by a beneficiary whose interest is vested, but defeasible: see *infra*, note 22; or where a charge, such as an annuity, is imposed upon the otherwise absolute interest, and the chargee is not party to the proposed premature termination: see *Montreal Trust Co. v. Allen* (1978), 82 D.L.R. (3d) 311 (Sask. C.A.).

[22] *Re Squire*, [1962] O.R. 863, 34 D.L.R. (2d) 481 (H.C.J.). See, also, *Re Townshend* (1941), 16 M.P.R. 69, [1941] 3 D.L.R. 609 (N.B. Ch. Div.); *Re Mallory*, [1951] O.W.N. 661 (H.C.J.); and *Fries v. Fries*, [1977] 1 W.W.R. 289 (Man. Q.B.).

[23] The same result occurs where a gift of an interest is vested, but defeasible. In such circumstances, the person or persons entitled, should the vested beneficiary not attain the prescribed age, must join the vested beneficiary and consent to the termination if *Saunders v. Vautier* is to be exercisable: see *Re Barton*, [1941] S.C.R. 426, [1941] 3 D.L.R. 653, and *In re Stedman Estate*, [1948] 2 W.W.R. 687 (Alta. S.C.).

Secondly, the testator may have intended that his executors and trustees should "build up" the asset for a period after the testator's death, and at the close of that period pay the capital and the accumulated income to the beneficiary. A gift that is payable three years after the testator's death is an example of this type of provision; it is an objective event, which is not regarded as a condition personal to the beneficiary. On the other hand, if the gift is made contingent, that is, subject to a condition precedent that A survive the chosen period or until the chosen date, the gift over can easily be drawn in such a way that judicial approval to a termination is required, although A himself is of age. If judicial approval is required, A must calculate whether he is sufficiently anxious to obtain the capital before the close of the chosen period or the occurrence of the prescribed date that he is prepared to have a sum set aside for those who will take in the unlikely event of his not surviving until the close of the period or the date in question.[24]

There are surprisingly few Canadian cases, however, where the beneficiary has been able to show that the absolute interest is indefeasibly vested in himself, and that all that has occurred is a postponement of the enjoyment. Whether a gift is vested or contingent is often extremely difficult to determine, but, on the whole, the courts appear to find most gifts of this type to be contingent.

Thirdly, instalment gifts seem to provide a ready invitation for the application of the rule in *Saunders v. Vautier*. The testator usually has had in mind a specific sum as the quantum of his intended gift, but his primary intention was that the beneficiary should receive regular payments over a period of time. He may have had a form of gift in mind that approximates an annuity. But what he does is provide that so much *per* month or *per* year is to be paid to the beneficiary until the intended sum is exhausted. This is what the testator did in *Montreal Trust Co. v. Krisman*.[25] The widow was to have $15,000 per year out of the proceeds of insurance policies on the testator's life. These were made payable to his estate. On his death, his widow called for, and obtained, the entire proceeds of the policies since the gift was not contingent in any way. Had the draftsman given the widow an annuity of $15,000 *per annum*,[26] or set up a discretionary trust in her favour with a gift over on non-attainment of the next birthday, or simply made each instalment contingent on the beneficiary surviving until an anniversary date, again with gifts over to minors or unborn persons,[27] the rule in *Saunders v. Vautier* would have been inapplicable, and an application to the court would have been necessary to alter or revoke the trust.

The fourth situation in which *Saunders v. Vautier* terminations are familiar concerns discretionary trusts. Such a trust may be in favour of an individual or a group of persons. In *Re Hamilton*,[28] for instance, the testator left a share of residue to A with the proviso that, if the trustees should not think it desirable to pay the whole fund to A upon her attaining majority, they might hold the capital for such time as they thought fit, in the meantime paying the income to A. This was a situation involving an exercise of discretion, but it is not the usual form of discretionary trust. *Re McKeon*,[29] on the other hand, was the typical kind of discretionary "support trust": A, the beneficiary, was to be educated and supported out of the capital and income. Even if the trust had been intended to support A well into her adult life, the same result would have flowed. The trusts of *Re Hamilton* and *Re McKeon* were both held capable of termination under *Saunders v. Vautier* upon the beneficiary coming of age. Each trust gave the beneficiary a sole and absolute interest in the trust fund, which vested in interest on the instrument taking effect. To avoid the application of *Saunders v. Vautier*, the trustees must have the discretion to withhold trust property from the object or any of the objects of the trust. If a gift over to minors is inserted, however, or to persons who must be born within the perpetuity period, the donor may by these means keep the trust in being for the desired period.

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[24] See *Re Boudreau Estate* (1965), 47 D.L.R. (2d) 584 (N.B.S.C., App. Div.), and *Re Winn* (1968), 66 D.L.R. (2d) 182 (Sask. Q.B.).

[25] [1960] S.C.R. 659, 24 D.L.R. (2d) 220. See, also, *In re Dawson Estate*, [1941] 1 W.W.R. 177, [1941] 1 D.L.R. 790 (Alta. Q.B.); *Re Burger*, [1949] 1 W.W.R. 280 (Alta. Q.B.); and *Re Price Estate* (1966), 55 W.W.R. 26, 55 D.L.R. (2d) 458 (Sask. Q.B.).

[26] *Re Eves* (1965), 50 D.L.R. (2d) 88 (Sask. Q.B.).

[27] *Montreal Trust Co. v. Klein*, [1971] 4 W.W.R. 644 (Man. C.A.).

Discretionary trusts in favour of a class or an enumerated list of persons are also subject to similar termination under *Saunders v. Vautier*. It matters not that powers of maintenance, advancement, encroachment on capital, or powers of appointment are incorporated. All can be over-ridden.[30] Thus, in *Re Johnston*,[31] a trust was terminated where the trustee was directed to accumulate part of the trust fund and to encroach on capital and accumulations, the trustee protesting that it was anxious to continue exercising its discretion as to encroachment.

Fifthly, there is the principle in *Barford v. Street*,[32] which is another instance of a beneficiary being entitled to call for the trust property where there is the immediate conferment upon the beneficiary of an absolute interest in the property, without that being the intention of the testator. Suppose a trust instrument confers a life interest in certain property upon A, and then gives A a general power of appointment, exercisable by deed or will, as to capital. In default of appointment, there is a gift over to third parties. A and the third parties each have immediate vested interests, although the third parties' interest is defeasible by the exercise of the power of appointment in favour of others. If the third parties are adult, capable, and ascertained, they can join with A to terminate the trust. But, since A has a power of appointment that he can exercise in favour of himself, and thus eliminate the third parties, can he not call for the capital in his lifetime on the basis that he has the income, and can make the capital his own? In this way, he terminates the trust without the assistance of, and the benefit passing to, the third parties.

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[28] (1912), 27 O.L.R. 445, 8 D.L.R. 529, aff'd (1913), 28 O.L.R. 534, 12 D.L.R. 861 (App. Div.).

[29] (1913), 25 O.W.R. 146, 14 D.L.R. 370 (App. Div.).

[30] See *Re McCarthy's Estate* (1976), 15 N.B.R. (2d) 243 (N.B.Q.B.), and *Re Lithwick* (1975), 9 O.R. (2d) 643 (H.C.J.).

[31] *Re Johnston* (1964), 48 D.L.R. (2d) 573 (B.C.S.C.).

[32] *Barford v. Street* (1809), 16 Ves. Jun. 135, 33 E.R. 935.

Barford v. *Street* establishes that he can do just this; if a beneficiary has a life estate and a general power to appoint by deed or will as to the capital of the gift, he can exercise the power in his own favour, or apply to the court for an order, and thus acquire the capital, and so terminate the trust. There is not even a question of the capital passing only to the beneficiary's estate on the beneficiary's death. He obtains the whole trust fund immediately. A general power to appoint is regarded by the law as tantamount to ownership, and, if the beneficiary wishes to exercise the power in his own favour or shows such a wish by applying to the court for an order vesting the property in himself, the life tenancy and the remainder merge, and the entire equitable interest is his. Of course, the intention of the testator (or settlor) was clearly to give A an income interest for life, and to enable A to choose who the capital beneficiary should be after A's death. This intent automatically fails.[33]

The principle in *Barford* v. *Street* has also been held to apply where the trust instrument gives A the power to appoint by will only. He will still be able to obtain the capital in his lifetime. However, this can occur, it seems, only in those circumstances where those who are to take in default of appointment are A's residuary beneficiaries or intestate heirs. A default gift to A's estate is effectively regarded as a gift to A himself.[34] Indeed, the absence of any default gift in the trust instrument conferring the power of appointment upon A has been held in British Columbia to give rise to the same result.[35]

Whether the principle in *Barford* v. *Street* can be described as an instance of the operation of the rule in *Saunders* v. *Vautier* may be open to question. Certainly, *Saunders* v. *Vautier* is sometimes cited in the *Barford* v. *Street* authorities, but for present purposes the similarity of the result produced by the two lines of authority is significant, even if the origin of these two "rules" is distinct.

The sixth situation in which the rule in *Saunders* v. *Vautier* operates to produce a probably unintended, but certainly curious, result is exemplified by *Wharton* v. *Masterman*.[36] One aspect of the well-known Masterman will of the late nineteenth century in England concerned the rights of certain named charities to the income arising from a residuary fund when twenty-one years had passed since the testator's death. The *Accumulations Act* prohibited any accumulations after this time, and the question was whether the charities took the subsequent income as it arose, or whether it passed as undisposed of property to the testator's next-of-kin. The House of Lords held that, in the circumstances, the charities were entitled, both during and after the permitted accumulations period, to all the income not needed to pay certain annuities, as well as the capital of the fund on the death of the last surviving annuitant. Since no one but the charities was entitled to the excess in any year, under the rule in *Saunders v. Vautier* the charities were able to call for that excess as it arose each year, and thus there was no undisposed of property at any time to pass to the next-of-kin.

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[33] See *In re Mewburn Estate*, [1939] S.C.R. 75, [1939] 1 D.L.R. 257, foll'd in *Re Jones*, [1949] 3 D.L.R. 604 (Man. C.A.), and *Re Southam Trust*, [1954] O.W.N. 923, [1955] 1 D.L.R. 438 (H.C.J.).

[34] See *Re Hooper* (1914), 7 O.W.N. 104 (H.C. Div.), and *Re Campbell Trusts* (1919), 17 O.W.N. 23 (H.C. Div.). *Berwick* v. *Canada Trust Co.*, [1948] S.C.R. 151, [1948] 3 D.L.R. 81, has, in effect, cast doubt on these decisions, although this has not been taken up in subsequent cases.

[35] See *Re Johnston*, *supra*, note 31, *per* Nemetz J. However reasonable as an outcome, it is difficult to rationalize this decision. On failure to appoint, the property in question would pass to the *donor's* estate, and thus to *his* residuary beneficiary or next-of-kin.

[36] *Wharton* v. *Masterman*, [1895] A.C. 186 (H.L.).

This case has been commented upon in a number of leading authorities,[37] and, although the case has never been said to have been wrongly decided, the question has been raised whether the interests of those entitled to undisposed of property can indeed be set aside as *Wharton v. Masterman* purports to do. However, we need not pursue the matter here; our only point is to demonstrate that the rule has been applied to gifts to charitable institutions. Indeed, if the trust instrument creates a gift for a charitable institution, and the proper construction is that the gift takes the form of capital made available for the general purposes of the charity, the institution – like any other donee – can call for that capital immediately upon the trust instrument taking effect.[38] There is no need for the charity to await future payment dates or events, or to abide by the donor's provision that the sum in question shall be paid in instalments.[39] Similarly, if several charities are named as the object of a discretionary trust, they can agree and call for the capital at once, dividing it among themselves as they think fit.[40]

The above circumstances have all been concerned with the termination of a trust, and there is no doubt that *Saunders v. Vautier* entitles the beneficiaries to terminate the trust before it would naturally have come to a close.[41] However, there is some controversy whether the beneficiaries can vary the terms of the trust, as opposed to terminating the trust prematurely, under the common law rule. On the one hand, it is argued that, as beneficiaries possess the entire equitable ownership, they should be able to deal with the property as they choose.[42] The generally accepted view, however, is that, if the trustees are instructed by the beneficiaries not to hand over the trust property, but to act in a manner that is not permitted by the trust instrument, and the trustees choose to insist that they have no obligation to accept such instructions, they are entitled to take this position.[43] Accordingly, if the beneficiaries wish to have a certain person appointed trustee whom the existing trustee with the power to appoint new trustees reasonably considers unsuitable, the beneficiaries have no alternative but to terminate the trust and resettle the trust property, naming the desired person as trustee. We have discussed this matter at greater length in chapter 2, and have there expressed the view that this generally accepted opinion is conceptually preferable.[44] We have therefore recommended that, subject to the power of delegation, the powers conferred on trustees by statute or by the trust instrument, or as a result of their having title to trust property, should be exercisable by them solely within their own discretion, notwithstanding that all the beneficiaries are ascertained, of age, and under no disability.[45]

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[37] See, for example, *Berry v. Geen*, [1938] A.C. 575 (H.L.), and *Re Burns* (1961), 25 D.L.R. (2d) 427 (Alta. S.C., App. Div.).

[38] See *Re Beresford Estate* (1966), 56 W.W.R. 248, 57 D.L.R. (2d) 427 (B.C.S.C.).

[39] *Saunders v. Vautier* cannot be invoked if the charity is made a gift of income in perpetuity: see *Halifax School for the Blind v. Chipman*, [1937] S.C.R. 196, [1937] 3 D.L.R. 9; or if the instrument of gift requires the charity to hold the capital as an endowment: see *Re Levy*, [1960] Ch. 346, [1960] 1 All E.R. 42 (C.A.). The crucial factor in the first instance is that, since the rule against perpetual duration does not apply to charities, the charity cannot claim the capital itself, and, in the second instance, that the gift is not for the general purposes of the charity: see Waters, *supra*, note 3, at 435.

[40] See *In re Nelson*, [1928] Ch. 920 (C.A.), foll'd by Romer J. in *In re Smith*, [1928] Ch. 915, at 918.

[41] A further right of termination may exist where the testator directs that an asset shall be purchased for the beneficiary with a specific capital sum, and the beneficiary claims the capital sum instead: see *Re Browne's Will* (1859), 27 Beav. 324, 54 E.R. 127, and *In re Boxall Estate*, [1946] 3 W.W.R. 413 (Sask. C.A.), commented upon by Gordon, "Case and Comment", 24 Can. B. Rev. 818, and Whitmore, "Correspondence", 25 Can. B. Rev. 117. See, also, *Gotte v. Nairne* (1876), 3 Ch. D. 278.

[42] For example, it is said that the beneficiaries, being adult and together comprising all possible interests in the trust property, may appoint new trustees rather than terminate and resettle the trust: see Keeton and Sheridan, *The Law of Trusts* (10th ed., 1974), at 224.

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The rule in *Saunders v. Vautier* is derived from the concept that the person or persons with the entire equitable ownership are in as absolute a position as the person or persons who at law have the entire legal ownership. It follows that the equitable owner or owners can call for the legal estate when they choose.[46] This particular doctrine – as we have noted, of some antiquity – travelled with the English settlers throughout the common law world. Thus, until the nineteenth century, it was also accepted in the various jurisdictions of the United States.[47]

In the nineteenth century, however, *laissez-faire* economic theory came to dominate American thought, and, by the latter half of that century, this philosophy had had a significant impact upon the case law development of law and equity. The notion was encouraged that he who owns property should be able to dispose of it on the terms that he chooses. The spendthrift trust, which permits the settlor or testator to transfer property on condition that the beneficiary may not alienate his interest to anyone, was one outcome of this line of thought.[48] The "material purpose" doctrine was another outcome. Under the latter principle, if the terms of the trust reveal the purpose or intention of the settlor or testator in setting up the trust, and if that purpose is central or material to the choice of the term or terms in question, there can be no termination of the trust that would defeat those terms and negate that purpose.

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[43] See *Re Brockbank*, [1948] Ch. 206, [1948] 1 All E.R. 287. Keeton and Sheridan, *supra*, note 42, concede that a beneficiary appointment is only possible if there is no other person with an express or statutory right to appoint.

[44] See *supra*, ch. 2, sec. 6(a).

[45] Draft Bill, s. 14.

[46] The term "owner" in this context means ownership of an *interest* (or estate) in the property in question.

[47] Scott, *The Law of Trusts* (3d ed., 1967), § 337, at 2655-58. See, for example, *Smith v. Harrington*, 4 Allen 566 (Mass. 1862).

[48] See further, *supra*, ch. 5, sec. 4(d).

The leading case on the subject of the material purpose doctrine was, and remains, *Claflin v. Claflin*,[49] a decision in 1889 of the Supreme Judicial Court of Massachusetts. The trust in that case set up an instalment gift. Income was to be paid annually to the sole beneficiary, but the capital was to be paid in three instalments, namely, at the ages of twenty-one, twenty-five, and thirty years. The Court held that on the evidence of the trust terms there was an obvious material purpose, and that the beneficiary was therefore not entitled to have the capital on his coming of age.

Since the nineteenth century, the spendthrift trust has been substantially curbed by statute in nearly all American jurisdictions, largely to protect unsecured creditors and the immediate family of the spendthrift,[50] but the recognition of the validity of the restraint on anticipation enunciated in the *Claflin* case remains, and in fact prevails, in the great majority of the states. It is so widely accepted today, long after the demise of the *laissez-faire* philosophy, because of the view that the intent of the settlor or testator should be given effect so long as it does not contravene public policy. Public policy, to the American mind, is expressed in the perpetuity rule, so far as trusts are concerned.[51]

Material purpose is largely a question of fact, and evidence for determining whether there is such a purpose may be drawn from within the trust instrument creating the trust, or from the circumstances in which the settlor or testator has created the trust. The most obvious areas in which the material purpose doctrine would apply are trusts involving postponement of possession to a later age or date and instalment gifts. Discretionary trusts and maintenance trusts impose distinct dispositive discretions upon trustees, and American courts take the view that to permit premature termination of such trusts would be to take away that discretion from the trustee.[52] In other *Saunders v. Vautier* situations American courts have expressed different views on what is a material purpose. However, they have uniformly applied the material purpose doctrine to corporations and charitable trusts, as they have applied it to individuals.

But what has proved difficult is the principle in *Barford v. Street*.[53] What exactly is the testator's purpose where he gives A a life interest, and then confers upon A a power to appoint the capital to himself? Is there a clue to the purpose where A may only appoint by will? In the latter case, most

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[49] 149 Mass. 19, 20 N.E. 454 (Mass. Sup. Jud. Ct. 1889).

[50] See, *supra*, ch. 5, sec. 4(d).

[51] Conditions precedent or subsequent to trust interests must also not contravene public policy considerations as to the integrity of race, marriage or the rights of parents in the bringing up of their children. This approach is shared with Commonwealth jurisdictions.

[52] See, for example, *Atwood v. First National Bank of Boston*, 320 N.E. 2d 873 (1974), where the trustee had a discretionary power of encroachment upon capital in favour of the beneficiary.

[53] *Supra*, note 32.

American courts think there is, and refuse termination.[54] But, where the power to appoint is by deed or will, the courts are divided. Nevertheless, this can be said: *Barford v. Street* presents a genuine question of fact on which courts in any common law jurisdiction might differ. In the main, American courts are not willing to interfere with "active trusts", in which trustees have duties peculiar to the particular trust. Nor will they terminate trusts with contingent interests. On the other hand, where there is a life interest, followed by a direction to divide the capital among vested remaindermen, the courts are likely to permit termination during the life tenant's lifetime. Only if it is apparent that the settlor or testator had some further object in mind, such as the protection of a widow or disabled child, will the life interest, and, therefore, the trust, be preserved.[55]

The balance between regard for the trust creator's purpose and concern for the wishes of the beneficiaries to do with the property as they think will benefit them most, is not the issue before an American court. The primary consideration of most American courts in this situation is probably best expressed in the recent codification of the Indiana Trust Code, which provides as follows:[56]

> 30-4-3-24. – (a) On petition by a trustee or beneficiary, the court may, in its discretion, terminate the trust:
>
> (1) if the purpose of the trust has been fulfilled or has become illegal or impossible of fulfillment; or
>
> (2) if, owing to circumstances not known to the settlor and not anticipated by him, the continuance of the trust would defeat or substantially impair the accomplishment of the purpose of the trust.
>
> (b) The court shall include in its order under subsection (a) of this section a provision making such a distribution of the trust estate as the court deems most nearly in conformance with the settlor's intent.

A principal concern of many trust beneficiaries today is that the trust should not be the cause of a greater tax and duty imposition than would be the case if each beneficiary were to have the capital sum. This is an eventuality that almost all settlors and testators would also seek to avoid. Their purpose is the welfare of their beneficiaries. Consequently, if the tax burden is increased to the point of disadvantage, an application for termination would be appropriate under the second paragraph of section 30-4-3-24 of the Indiana Code. On the other hand, a beneficiary would not be able to obtain the present capital value of his deferred possessory interest, unless he could show that circumstances now existing were not, or could not have been, in the mind of the settlor or testator, and that, if they had been, he would not have wished to have the particular terms in the trust instrument.[57]

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[54] Scott, *supra*, note 47, § 340, at 2708. See, also, *White Estate*, 25 D. & C. 2d 606 (Pa. 1961).

[55] Scott, *supra*, note 47, § 337.1, at 2658-64. In the absence of evidence of intention, it is assumed that the capital interest is postponed in possession merely to give an interest to the preceding estate holder. In the absence of material purpose, of course, a trust may be prematurely terminated, and this will occur by gift, purchase, or inheritance leading to merger in the hands of the life tenant or the remainderman, as the case may be.

[56] Ind. Stats. Ann., Code Ed., § 30-4-3-24 (Burns). An agreement among the beneficiaries that the trust should be terminated may be considered, but if none of the grounds provided in this section can be shown, the court cannot order termination.

The fact that the proposed variation of the beneficial interests would be advantageous to the beneficiaries, or that there is a dispute among the beneficiaries, is not enough to justify a variation: see *Estate of Gilliland*, 118 Cal. Rptr. 447 (Ct. App. 2d 1975). This decision reflects in character the essential nature of the inherent jurisdiction in Ontario courts, now overlaid by the *Variation of Trusts Act*, *supra*, note 2.

3. REFORM IN OTHER JURISDICTIONS

For the most part, other Commonwealth jurisdictions adhere to the rule in *Saunders v. Vautier* supplemented by variation of trusts legislation. Two jurisdictions, Alberta and Manitoba, however, have made proposals for reform in this area, and have enacted legislation which, in effect, abrogates the rule in *Saunders v. Vautier*.

In 1972, the Alberta Institute of Law Research and Reform published its Report No. 9, *The Rule in Saunders v. Vautier*.[58] After examining the rule and its rationale, the Institute concluded that the rule should be changed.[59] From a policy point of view, the Institute expressed the opinion that "[t]he theoretical consequence of absolute ownership should not operate automatically to defeat the testator's intention".[60] In particular, the Institute noted that if "[t]he law allows [a settlor or testator] to make the gift, . . . there should be no rule of 'legal theology' to prevent him from imposing restrictions upon enjoyment even when the ownership is vested and indefeasible".[61] As a practical matter, the Institute conceded that a testator who wants to avoid the operation of *Saunders v. Vautier* can do so by careful drafting. Nonetheless, the Institute emphasized that "gifts are not always framed in a way to ensure this; and the law should not lay traps which require sophistication to avoid".[62] Indeed, the Institute concluded that "[t]here is no point to a rule which merely penalizes poor drafting and there is nothing to be said for a policy which can be got around by a different form of words".[63]

As between leaving the rule as it is and a complete repeal of the rule, the Institute found neither approach to be attractive. Rather, the Institute concluded that "the best course is to replace *Saunders v. Vautier* to the extent of giving to the court power to decide whether to permit termination or variation of the trust. This will permit the court to take cognizance of the donor's intent, which is ignored when *Saunders v. Vautier* applies, and also the interest of the donee".[64]

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[57] It follows that, if the settlor is alive and agrees with the beneficiaries, they all being ascertained and capable, that the trust should be substantially varied or terminated, this can be done: see *Woodruff v. Trust Co. of Georgia*, 210 S.E.2d 321 (Ga. S.C. 1974). See, also, Scott, *supra*, note 47, § 338, at 2687-93.

[58] Institute of Law Research and Reform, Report No. 9, *The Rule in Saunders v. Vautier* (February, 1972) (hereinafter referred to as "Alberta Report").

[59] *Ibid.*, at 5.

[60] *Ibid.*

[61] *Ibid.*

[62] *Ibid.*

[63] *Ibid.*, at 5-6.

The recommendations made by the Institute were adopted by the Alberta legislature, and enacted in 1973 by way of amending those provisions contained in the *Trustee Act* that dealt with variation of trusts.[65] Section 42 of the present Alberta *Trustee Act* provides as follows:

> 42.—(1) In this section, 'beneficiary', 'beneficiaries', 'person' or 'persons' includes charitable purposes and charitable institutions.
>
> (2) Subject to any trust terms reserving a power to any person or persons to revoke or in any way vary the trust or trusts, a trust arising before or after the commencement of this section, whatever the nature of the property involved and whether arising by will, deed or other disposition, shall not be varied or terminated before the expiration of the period of its natural duration as determined by the terms of the trust, except with the approval of the Court of Queen's Bench.
>
> (3) Without limiting the generality of subsection (2), the prohibition contained in subsection (2) applies to
>
> (a) any interest under a trust whereunder the transfer or payment of the capital or of the income, including rents and profits
>
> (i) is postponed to the attainment by the beneficiary or beneficiaries of a stated age or stated ages,
>
> (ii) is postponed to the occurrence of a stated date or time or the passage of a stated period of time,
>
> (iii) is to be made by instalments, or
>
> (iv) is subject to a discretion to be exercised during any period by executors and trustees, or by trustees, as to the person or persons who may be paid or may receive the capital or income, including rents and profits, or as to the time or times at which or the manner in which payments or transfers of capital or income may be made,
>
> and
>
> (b) any variation or termination of the trust or trusts
>
> (i) by merger, however occurring;
>
> (ii) by consent of all the beneficiaries;

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[64] *Ibid.*

[65] *The Trustee Act*, R.S.A. 1970, c. 373, s. 37, as am. by S.A. 1973, c. 13, s. 12. See, now, *Trustee Act*, R.S.A. 1980, c. T-10, s. 42.

(iii) by renunciation of his interest by any beneficiary so as to cause an acceleration of remainder or reversionary interests.

(4) The approval of the Court under subsection (2) of a proposed arrangement shall be by means of an order approving

(a) the variation or revocation of the whole or any part of the trust or trusts,

(b) the resettling of any interest under a trust, or

(c) the enlargement of the powers of the trustees to manage or administer any of the property subject to the trusts.

(5) In approving any proposed arrangement, the Court may consent to the arrangement on behalf of

(a) any person who has, directly or indirectly, an interest, whether vested or contingent, under the trust and who by reason of minority or other incapacity is incapable of consenting,

(b) any person, whether ascertained or not, who may become entitled directly or indirectly to an interest under the trusts as being, at a future date or on the happening of a future event, a person of any specified description or a member of any specified class of persons,

(c) any person who is a missing person (as defined in the *Public Trustee Act*) or who is unborn, or

(d) any person in respect of any interest of his that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined.

(6) Before a proposed arrangement is submitted to the Court for approval it must have the consent in writing of all other persons who are beneficially interested under the trust and who are capable of consenting thereto.

(7) The Court shall not approve an arrangement unless it is satisfied that the carrying out thereof appears to be for the benefit of each person on behalf of whom the Court may consent under subsection (5), and that in all the circumstances at the time of the application to the Court the arrangement appears otherwise to be of a justifiable character.

(8) When an instrument creates a general power of appointment exercisable by deed, the donee of the power may not appoint to himself unless the instrument shows an intention that he may so appoint.

(9) When a will or other testamentary instrument contains no trust, but the Court is satisfied that, having regard to the circumstances and the terms of the gift or devise, it would be for the benefit of a minor or other incapacitated beneficiary that the Court approve an arrangement whereby the property or interest taken by that beneficiary under the will or testamentary instrument is held on trusts during the period of incapacity, the Court has juridiction under this section to approve such an arrangement.

The Manitoba Law Reform Commission published its *Report on The Rule in Saunders v. Vautier* in 1975.[66] The Commission endorsed the reasoning and position taken by the Alberta Institute and the subsequent legislation, noting that it "creates a more equitable balance between the wishes of the testator or settlor and those of the beneficiaries".[67] While the Commission recommended the adoption of provisions similar to those suggested by the Alberta Institute and contained in the Alberta *Trustee Act*, it did suggest several changes.

First, the Commission noted that the Alberta provision does not actually order the trustees to comply with the proposed arrangement once it has been approved, but simply authorizes the court to approve it. Because difficulties of enforcement could arise, the Manitoba Commission recommended that a direct power of variation should be conferred upon the court, so that there would be no question about compliance with the arrangement.[68]

Secondly, the Manitoba Commission suggested that difficulties could arise as a result of requiring all the capable beneficiaries to consent in writing as a precondition to the exercise of the court's jurisdiction to vary or terminate the trust. The Commission noted that "much may be said for the argument that the Courts should have a residual authority to overrule the recalcitrant adult when his objections are blocking a proposal obviously beneficial to the trust as a whole".[69] On balance, however, the Manitoba Commission agreed with the Alberta position that to allow trust variation and termination over the objections of one or more capable beneficiaries would be to allow the court too wide a power.

The Manitoba Commission also noted that the Alberta legislation confers an almost "unlimited discretion" upon the court to determine whether to allow the proposed arrangement. The guidance given to an Alberta court is that it must be satisfied that the arrangement is for the benefit of each incapacitated or unborn person, for example, on behalf of whom the court is authorized to consent, and that "in all the circumstances at the time of the application to the Court the arrangement appears otherwise to be of a justifiable character".[70] While not quarrelling with this provision, *per se*, the Manitoba Commission noted that no mention is made of the testator's or settlor's intentions, because, it suspected, "the traditional common law approach of upholding such intentions wherever possible will continue to hold sway".[71] Nonetheless, the Commission concluded that there should be a direction to the court to take into consideration, among other things, the intentions of the settlor or testator, stating that "[t]his would at least give the donors of trust property a little more confidence in the future of their directions".[72]

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[66] Manitoba Law Reform Commission, *Report on The Rule in Saunders v. Vautier* (Report No. 18, 1975) (hereinafter referred to as "Manitoba Report"). See, also, Manitoba Law Reform Commission, *Report on the Rules against Accumulations and Perpetuities* (Report No. 49, 1982), at 54-59.

[67] Manitoba Report, *supra*, note 66, at 25.

[68] *Ibid.*

[69] *Ibid.*, at 25-26.

[70] Alberta *Trustee Act*, *supra*, note 65, s. 42(7).

[71] Manitoba Report, *supra*, note 66, at 26.

Finally, the Manitoba Commission expressed concern about the manner in which the Alberta legislation deals with the rule in *Barford v. Street*. It will be recalled that the Act provides that "[w]hen an instrument creates a general power of appointment exercisable by deed, the donee of the power may not appoint to himself unless the instrument shows an intention that he may so appoint."[73] The Manitoba Commission wondered whether the requirement that the donor evince this intention expressly in the trust instrument would result in the same trap for the unwary draftsman as the rule in *Saunders v. Vautier*. Nevertheless, the Commission was of the view that, at least, the Alberta provision was "a more refined approach to the problem of general powers of appointment, than the uncertain and artificial law presently being applied",[74] and accordingly recommended adoption of the Alberta position.

The Manitoba Law Reform Commission recommended that, subject to the above-noted changes, the provisions enacted by the Alberta legislature should be incorporated in the Manitoba *Trustee Act* as part of, and including, the present section 61 of that Act, which is the equivalent of the Ontario *Variation of Trusts Act*. The Manitoba legislature has recently enacted legislation[75] containing provisions very similar to those contained in the Alberta *Trustee Act* concerning the variation and termination of trusts. The Manitoba provisions, unlike the Alberta legislation, define what is meant by the term "benefit": when the court is determining whether an arrangement to vary or terminate a trust is for the benefit of a person, it must consider whether the arrangement "would enhance the financial, social, moral or family wellbeing"[76] of the person. The Manitoba legislation does not, however, adopt the suggestion made by the Manitoba Law Reform Commission that statutory reference should be made to the testator's or settlor's intention.

4. ALTERNATIVES FOR REFORM

As we have discussed, the present law of Ontario is to the effect that, if the trust beneficiaries are all ascertained, adult, and mentally capable, they can together wind up the trust, whatever its terms, at a time of their choosing under the rule in *Saunders v. Vautier*. If any one beneficiary is unascertained, a minor, or unborn, any interested party may put an arrangement before the court, whereby the terms of the trust may be varied or the trust may be terminated. A variation may take the form of a change in the administrative or dispositive provisions of the trust, and a termination will normally involve the distribution of capital to adult beneficiaries, with capital being held on trust for each minor or unborn beneficiary. Applications to the court for approval of such arrangements are made under the *Variation of Trusts Act*, which, for all intents and purposes, has overlaid the old inherent jurisdiction of the court.

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[72] *Ibid.*

[73] Alberta *Trustee Act*, *supra*, note 65, s. 42(8).

[74] Manitoba Report, *supra*, note 66, at 28.

[75] *The Trustee Act*, R.S.M. 1970, c. T160, s. 61, as am. by *An Act to Amend The Trustee Act*, Bill 35, 1982 (33d Leg. 2d Sess.), s. 4. The amending legislation (S.M. 1982-83, c. 38) received Royal Assent on August 18, 1983 and was declared in force October 1, 1983.

[76] *Ibid.*, s. 61(8)(*a*).

The *Variation of Trusts Act* was intended to complement substantively the rule in *Saunders v. Vautier*. Before 1960, beneficiaries with minors or unborn persons among their number had to apply to the court under the inherent compromise jurisdiction.[77] However, when the courts in England held[78] that this jurisdiction did not enable the courts to agree to a "compromise" whereby the quantum or nature of the beneficial interests was changed to accommodate the estate planning of the beneficiaries, legislation to complement the *Saunders v. Vautier* rule became vital. The Act also complements the rule procedurally. The court consents on behalf of the unascertained and incapacitated, and this supplies the approval which, added to that of the adult and capable beneficiaries under the common law rule, allows the trust to be terminated.

The Commission has considered several possible alternatives for reform. First, the law could be left as it is, with the rule in *Saunders v. Vautier* complemented by the *Variation of Trusts Act*. Secondly, all premature trust terminations could be brought under the *Variation of Trusts Act*, so that the court could give or withhold approval depending upon all the circumstances, including the needs of the beneficiaries and the wishes of the settlor or testator. Thirdly, the common law rule and the *Variation of Trusts Act* could be replaced by the American "material purpose" doctrine, as set out in section 30-4-3-24 of the Indiana Trust Code.

The third of these alternatives, although a solution that commends itself to the very large number of common law jurisdictions in the United States, creates a considerable problem. In the United States today, not only is the rule in *Saunders v. Vautier* foreign, but any statutory jurisdiction like the *Variation of Trusts Act* is unknown. Anyone who would recommend the "material purpose" doctrine for adoption in common law Canada, the United Kingdom, Australia, or New Zealand must contend with the fact that the *Variation of Trusts Act* has brought considerable relief to these jurisdictions. With the aid of the court a much needed flexibility has been introduced, whereby older trusts can be varied or terminated to meet contemporary tax planning needs. Estate planning of any person's assets, including those assets in trust, can now be rationally designed. Clearly this Act, or other legislation conferring the same jurisdiction upon the court, would have to remain.

Yet, if the *Variation of Trusts Act* were to be retained for trusts with unascertained, minor, or unborn beneficiaries, it is impossible to contemplate a situation where the "material purpose" doctrine would replace the rule in *Saunders v. Vautier*. The common law rule and the *Variation of Trusts Act* are complementary. The "material purpose" doctrine and the Act, on the other hand, are incompatible; they are pursuing different philosophies. The American approach is concerned solely with the objects sought by the donor in setting up the trust; the rule in *Saunders v. Vautier* is concerned only that the adult owner of the entire equitable interest shall act with the trust property as he pleases. Therefore, whatever the merits of the American approach, we are of the view that the direction that was taken in 1959 by the adoption of the *Variation of Trusts Act* is so well entrenched as the law of this Province that it should not be reversed in its entirety.

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[77] The inherent compromise jurisdiction of the court is only an emergency, or salvage, authority and is limited to situations where it can be demonstrated that failure to vary the trust would place the trust in severe jeopardy: see Waters, *supra*, note 3, at 905 and 906-07.

[78] See *Chapman v. Chapman*, [1954] A.C. 429 (H.L.), and *Re Wright*, [1954] O.R. 755, [1955] 1 D.L.R. 213 (H.C.J.). See, also, Waters, *supra*, note 3, at 904-09, for a description of the inherent jurisdiction.

As to the first and second alternatives, to leave the law as it is, or to make all premature trust terminations subject to the approval of the court, different views exist. In our opinion, there are powerful arguments for each course of action.

We turn first to the contention that the law of Ontario, as it stands at present, should not be changed. The argument has been put very forcibly to us that the essential issue concerning the rule in *Saunders v. Vautier* is whether or not the interests of the living are to be preferred to those of the dead. In other words, this is first and last a policy matter. The great seventeenth and eighteenth century founders of our property law, of which this rule is a part, strove for both flexibility and certainty. Their hostility to attempted restraints on an owner's freedom of alienation, to be found consistently underlined throughout the law of property, was complemented by their equal hostility to restraints on anticipation.[79] The protected life interest was permitted only because attempted alienation *terminates* the life interest; the restraint was not otherwise permitted, and never as in the case of the American spendthrift trust. Restraint on anticipation was permitted in only one instance, and that was in favour of the married woman, who, in earlier times and in circumstances since past, could lose her property through the blandishments of her husband. Flexibility for capable legal or equitable owners to deal with their property as they chose was thus a lodestone for those who were developing common law doctrine. Certainty was obtained through the crisp lines of doctrine, like *Saunders v. Vautier*. Property rights do not now, and should not in the future, it is argued, depend upon the vagaries of judicial discretion. Any abolition of the rule in *Saunders v. Vautier*, as recommended by the advocates of that course of action, would only bring about increased inflexibility and uncertainty.

This argument is underlined by the fact that the *Variation of Trusts Act* was a legislative endorsement of the rule in *Saunders v. Vautier*. Substantively and procedurally, the Act presupposes the continued existence of the common law rule. Substantively, the court consents on behalf of those who cannot consent for themselves, and it considers the benefit of those persons because they are not present or not able to consider for themselves whether they are being treated fairly by the proposed arrangement. Procedurally, the court's consent assumes that the adult and capacitated beneficiaries are capable of looking after themselves and will now proceed to implement the variation or termination. And, if by chance an adult and capable beneficiary has not done so, it is surely not for the court to be concerned with the benefit of such a person. Indeed, the idea that the adult beneficiary must ask the court to tell him what is in his own best interests not only puts the court in an awkward paternalistic role, but is in itself almost ludicrous.

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[79] "For a trust is the equitable equivalent of a common law gift, and, when once declared, the settlor, like the donor of a gift, has no further rights over the property unless he be also one of the beneficiaries or has reserved to himself a power of appointment": *Underhill's Law relating to Trusts and Trustees*, *supra*, note 3, at 602 (footnote reference omitted).

It is further contended that, if the rule is abrogated in favour of a judicial discretion, there is no guarantee that the intention of the settlor or testator will be upheld if the court is to consider *whether* or not to uphold it. In all likelihood, the intent of the settlor or testator will not be supported if the court finds better reason in the arguments of the adult living beneficiary for the variation or premature termination of the trust. As for the contention that the rule in *Saunders v. Vautier* is easily avoided by the competent draftsman, it has to be observed that his skills will merely lead, as the law stands, to an application under the *Variation of Trusts Act*, where the court will consider the benefit of the minors and unborn persons under the proposed variation or termination, in order that the common law rule can be applied.

Indeed, it is argued that not only does the present law work well, but to prohibit the premature termination of a trust by adult persons who possess the entire equitable ownership, unless the court approves, will create a myriad of doubts and difficulties. What of the simple and familiar situation where a will makes a gift to A, subject to an annuity in favour of B, and B wishes to renounce. A may be B's child, or B may wish to receive nothing under the will. Can B renounce (and A accept the benefit) without the consent of the court? If not, what exactly is to be gained in these circumstances by the requirement that judicial consent be obtained? Again, if it would suit the life tenant, a widow, to have a capital sum, so that, for instance, she can purchase an annuity, why should she not be able to sell her interest to the adult remainderman, and why should that remainderman, having the entire equitable interest, not be able to recover the legal estate from the trustees without the court's consent? And, for its part, what is the court supposed to consider if there is a simple scheme of a life interest, followed by a vested remainder interest, subject to no delayed vesting in possession? Again, does the beneficiary of a bare trust, set up by himself for himself, have to have the consent of the court to a termination?

Nor, it is contended, should any advocate of the abolition of the rule in *Saunders v. Vautier* overlook the problem of court costs. In the majority of instances in which the rule can be invoked – legacies postponed in possession, either in whole or as to instalments, to an age greater than majority – the amount of property involved is small. To force these legatees into court, and others in a similar position of deferred vesting in possession, is a measure out of all proportion to the alleged advantage of the court being able to take account of the testator's intent or purpose in creating gifts with such terms.

With respect, on the other hand, to the arguments for making all premature trust terminations, as well as all variations, subject to judicial approval, we have already spoken of the effect of the present law, and, in particular, the operation of the rule in *Saunders v. Vautier*. The prime contention is that the rule in *Saunders v. Vautier* is based upon legal logic – the consequence of the equitable ownership being "at home" in the beneficiary, or group of beneficiaries – and that this logic produces a lack of concern for the intentions of the settlor or testator. Whether the creator of the trust has designed a scheme that is harsh or realistic, gratuitously interfering, or wise is irrelevant. While, under the *Variation of Trusts Act* the court must consider the benefit to be derived by the unascertained and incapacitated beneficiaries, as well as the overall fitness of the proposed arrangement,[80] these or similar considerations are not a factor when the common law rule is invoked.

However, to advocate that all premature trust terminations should be subject to judicial scrutiny is not to say that the intention of the donor should be conclusive, or that it should even predominate. Rather, it is contended that the intention of the settlor or testator should be considered when the terms of the trust otherwise satisfy the criteria emanating from public policy, namely, the perpetuity rule and the rules that govern the imposition of conditions upon gifts, whether *inter vivos* or testamentary. If the terms of the trust are found to be realistic and wise, then a court should be able to withhold consent to a premature termination. The consolation for the donee is that he accepted a gift subject to terms, and that he has been unable to convince the court that his present circumstances justify the deletion of those terms.

The supporting arguments for this view are several. First, it is stressed that, unlike the case for the perpetuity rule, the alleged public policy nature of the rule in *Saunders v. Vautier* has never been explained adequately. As Lord Herschell L.C. said in *Wharton v. Masterman*,[81] "[t]he point seems, in the first instance, to have been rather assumed than decided. . . . It is needless to inquire whether the courts might have given effect to the intention of the testator in such cases . . . . The doctrine has been so long settled and so often recognised that it would not be proper now to question it." The occasion of the drafting of a new *Trustee Act* for Ontario, it can be said, would provide an opportunity to ensure that the intention of the settlor or testator is at least considered.

Secondly, it is noted that the courts have demonstrated on several occasions their hostility to the common law rule.[82] Courts struck by the soundness of provisions made by the trust instrument in question have evidently striven to find, despite the presumption in favour of early vesting, that interests are contingent rather than vested.[83] In one Canadian case, the Court treated an application as a request for an order for administration, rather than for construction. This allowed the Court to assume a discretionary jurisdiction, and to refuse the order.[84]

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[80] *In re Oakes' Settlement Trusts*, [1959] 1 W.L.R. 502 (Ch. D.), and *In re Van Gruisen's Will Trusts*, [1964] 1 W.L.R. 449 (Ch. D.).

[81] *Supra*, note 36, at 193.

[82] See, for example, *Curtis v. Lukin* (1842), 5 Beav. 147, 49 E.R. 533, at 536, *per* Lord Langdale M.R. For Canadian judicial criticism of the way in which the rule violates the settlor's intent, see *In re Stedman Estate*, *supra*, note 23, and *Re Townshend*, *supra*, note 22.

[83] See, for example, *Fast v. Van Vliet* (1965), 51 W.W.R. 65 (Man. C.A.); *Re McCallum*, [1956] O.W.N. 321 (H.C.J.); *Re Down* (1968), 68 D.L.R. (2d) 30 (Ont. C.A.); *Re Carlson* (1975), 55 D.L.R. (3d) 616 (B.C.S.C. *in banco*); and *Re Chodak* (1976), 59 D.L.R. (3d) 35 (Ont. H.C.J.).

Moreover, it has been questioned whether the rule in *Saunders v. Vautier* is promoting effectively any policy when a competent draftsman can prevent the beneficiary from having the opportunity to avail himself of the rule. As we noted earlier, the Alberta Institute of Law Research and Reform expressed the view that "the fact that the rule can be got around by careful drafting actually invalidates any rationale for it. There is no point to a rule which merely penalizes poor drafting, and there is nothing to be said for a policy which can be got around by a different form of words".[85]

Emphasis is also placed on the 1973 amendments to the Alberta *Trustee Act*, set out previously, whereby approval must now be sought from the court before any trust may be terminated.[86] An example of the application of section 42 of the Alberta Act is *Kinnee v. Public Trustee for Alberta*.[87] In that case, the testatrix devised a house to her infant son, and in her will, in which she made it clear that she wished her husband to have no part of her estate, she expressed an apprehension of the influence that the husband (and father) might have on the child. The devise was absolute and indefeasible, and, when the son attained majority at eighteen years, he sought title to the house, although by the terms of the trust he was not to have possession until his twenty-first birthday. It appeared that the son intended to transfer the house to his father upon payment of one-half its value. Hope J. refused the application, being satisfied that, in all the circumstances, it was not to the young man's benefit to acquire the property at that time.

It is of interest to compare the outcome and reasoning in this case with the earlier English case of *Re Steed's Will Trusts*,[88] where the applicant was a protected life tenant and was applying to have the trust terminated, although the trustees opposed that course of action. There the Court of Appeal refused to give its consent to an arrangement under the English *Variation of Trusts Act* because of the danger that the applicant, an elderly woman, would be preyed upon by her brother, as in the past, until he had acquired the property from her. In both instances, it is said, what the testator had provided was evidently realistic and wise.

5. CONCLUSIONS

In our opinion, the argument is well taken that the present issue is essentially one of policy. If it were a choice between the American "material purpose" doctrine on the one hand, and the rule in *Saunders v. Vautier* on the other, we would also agree that the policy decision is literally whether to favour the wishes of the dead or the interests of the living. These are the two poles of the controversy; acceptance of one means the total rejection of the other. However, we have earlier said that, because of the adoption of the *Variation of Trusts Act* in Ontario, the "material purpose" doctrine is simply not compatible with the philosophy that has since prevailed in Ontario, as well as in all the other Canadian and Commonwealth jurisdictions that have adopted that Act. The issue, as we see it, is between judicial discretion over the whole area of trust variation and premature termination, on the one hand, and the right to termination under *Saunders v. Vautier* plus judicial discretion in only those cases where there are actual or possible beneficiaries who cannot consent for themselves, on the other.

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[84] *In re Livingston Estate (No. 2)*, [1923] 1 W.W.R. 358 (Man. C.A.). Although this does not seem to have been a case where the applicant could exercise the rule in *Saunders v. Vautier*, that was expressly not a factor in the judgments given.

[85] Alberta Report, *supra*, note 58, at 5-6.

[86] See *supra*, this ch., sec. 3, and Alberta *Trustee Act*, *supra*, note 65, s. 42.

[87] *Kinnee v. Public Trustee for Alberta* (1977), 3 Alta. L.R. (2d) 59 (S.C., T.D.).

[88] *Re Steed's Will Trusts*, [1960] Ch. 407, [1960] 1 All E.R. 487 (C.A.) (subsequent references are to [1960] Ch.).

It is also quite true that, by enabling the courts to consent to variation or termination arrangements on behalf of those unable to consent, the legislation has endorsed the rule in *Saunders v. Vautier*.[89] Nor would we suggest that the policy pursued by the *Variation of Trusts Act* is in need of reconsideration. American lawyers might not agree with what has been done under the authority of that Act, but we are of the view that the Act has been of incalculable assistance in keeping trusts abreast of the times and, where appropriate, in terminating those trusts that the times or the parties' circumstances have completely overtaken. However, this does not mean that the Act could not now play an additional role that was not foreseen in England in 1958 or in Ontario in 1959.

Prior to 1959 in Ontario, upholding the intent of the settlor or testator was a central tenet in the law of trusts. The *Trustee Act* was, and remains, facultative, and the inherent jurisdiction to amend the terms of trusts was limited in scope and exclusively concerned with upholding and furthering the trust and its terms.[90] *Saunders v. Vautier* alone allowed beneficiaries to ignore the trust terms. In our view, although it was seen at the time of enactment as a complement to the common law rule, the *Variation of Trusts Act* marked a major change of direction.[91] For the first time, the court acquired the jurisdiction to approve extensive changes not only in the administrative, but also in the dispositive, provisions of trusts, even to the point of revoking such provisions. The essential concern of the court was the benefit of the beneficiaries unable to approve for themselves, and the variation of trusts legislation, as enacted everywhere within the Commonwealth, enabled the court to override the trust creator's intention. Nevertheless, from the first, that intention was recognized as having significance; it was a factor to be considered. In England, the Rules of the Supreme Court were amended at once, requiring the settlor, if living, to be joined as a necessary and proper party,[92] and, in 1970, it was suggested by a well-known Canadian text that this practice rule should be adopted in Ontario.[93]

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[89] This has been recognized since the legislation was first introduced: see, for example, Waters, "The Variation of Trusts" (1960), 13 Current Legal Problems 36, at 47.

[90] In *In re Walker*, [1901] 1 Ch. 879, at 885, Farwell J. said, "I decline to accept any suggestion that the court has an inherent jurisdiction to alter a man's will because it thinks it beneficial. It seems to me that is quite impossible."

[91] The first such legislation was the English *Variation of Trusts Act, 1958*, *supra*, note 4.

The courts, also, have expressed their view on this matter. In *Re Steed's Will Trusts*,[94] where the applicant was a protected life tenant, and was applying to have the trust terminated, even though the trustees opposed that course of action, the Court of Appeal in England upheld the trial judge's refusal to approve the applicant's arrangement. Lord Evershed M.R. made these remarks:[95]

> It is the arrangement which has to be approved, not just the limited interest of the person on whose behalf the court's duty is to consider it.
>
> If that is right, it then follows that the court must regard the proposal as a whole, and so regarding it, then ask itself whether in the exercise of its jurisdiction it should approve that proposal on behalf of the person who cannot give a consent, because he is not in a position to do so. If that is a right premise, then it follows that the court is bound to look at the scheme as a whole, and when it does so, to consider, as surely it must, what really was the intention of the benefactor. That such is a proper approach is at least supported by the provisions of R.S.C. Ord. 55, r. 14A(3A), which provides that in the case of an application under this Act, where there is a living settlor the living settlor is to be a party before the court. That rule seems to me to reinforce what I conceive to underly this provision, namely, that the court must, albeit that it is performing its duty on behalf of some person who cannot consent on his or her own part, regard the proposal in the light of the purpose of the trust as shown by the evidence of the will or settlement itself, and of any other relevant evidence available.

Lord Evershed M.R., with whom Willmer and Upjohn L.JJ. agreed, went on to observe that the testator wanted to make provision for the plaintiff throughout her life, and he well understood the risk that, if she were simply handed a sum of money, she might well part with it in favour of her brother, who had "sponged" on her in the past. The testator had felt these apprehensions, the trustees shared them, and the trial judge had rightly withheld his approval, also fearing what might be the outcome of such an approval.

Faced with the formidable argument that equity has always followed the principle of permitting the adult owner of the whole equitable interest (or all these owners together) to call for the legal estate, we have not found it easy to come to a decision as between the two schools of thought, whose views we have described. However, we have concluded that the intention of the creator of the trust should be a factor to be considered whenever there is a desire on the part of beneficiaries to depart from the terms of the trust. In order to ensure that this principle is applied in all cases of proposed variations and premature terminations of trusts, it is necessary, in our opinion, that all such proposals be brought before the court. The court would then have the opportunity to consider the intention or purpose of the settlor or testator in creating the particular trust terms, and whether, in the light of the circumstances that exist when application is made to the court, those intentions should be supported or ignored.

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[92] Rules of the Supreme Court, 1965, Jacob (ed.), *The Supreme Court Practice 1982*, Ord. 93, r. 6(2). The English Law Reform Committee, in its Sixth Report, *supra*, note 4, para. 15, was of the view that the settlor's views should be heard: "If a settlor objected to a proposed variation of the trusts, he would nearly always have some good grounds for doing so which would almost certainly incline the Court to refuse to sanction the proposed scheme." It made no reference, however, to evidence of the views or intent of a deceased settlor or testator. See, for further comment, McClean, "Variation of Trusts in England and Canada" (1965), 43 Can. B. Rev. 181, at 229.

[93] Sheard and Hull, *Canadian Forms of Wills* (3d ed., 1970), at 320. The same opinion is expressed in the 4th edition (1982), at 275.

[94] *Supra*, note 88.

[95] *Ibid.*, at 421. It will be noted that in the final sentence, as reproduced here, Lord Evershed is expressly referring to evidence of the intent of a deceased settlor, or a testator.

We recognize the fact that the common law has consistently opposed attempted restraints, but as a policy matter we do not consider equity to have so consistently adopted that stance[96] that there is not now a middle way between a total implementation of the intent of the creator of the trust and a total ignoring of that intent. Courts that feel impelled, if at all possible, to construe gifts as being contingent, or that regret the fact that on a proper construction the rule in *Saunders v. Vautier* applies, are impliedly saying that the settlor or testator knew what he was doing, and that, for instance, in introducing delays in vesting in possession or in giving a discretion to the trustees, the benefaction was a wise provision. In other cases involving *Saunders v. Vautier*, the courts admittedly may not have voiced regrets. But in the presence of judicial silence, no one can be sure what the courts would have said had a judicial discretion been exercisable.

We have also noted that the Report of the Alberta Institute of Law Research and Reform, released in February, 1972,[97] and the subsequent Report of the Manitoba Law Reform Commission, released in January, 1975, and reiterated in 1982,[98] on the subject of the rule in *Saunders v. Vautier* have come to the same conclusion as ourselves. Moreover, both Alberta and Manitoba have enacted legislation implementing these recommendations.[99]

As to the criticism that any change in the present law will lead to increased inflexibility and uncertainty, we are of the view that this overstates the argument. There is, of course, inflexibility to the extent that all premature trust terminations would need the court's consent,[100] but we do not consider this comparable to absolute inflexibility, where nothing can be done about a restraint imposed by a settlor or testator. So far as uncertainty is concerned, we would have thought that the terms of the trust supply certainty, and that the existing possibility of a variation of those terms or a premature termination by way of the court's approval under the *Variation of Trusts Act* introduces uncertainty. However, we do not consider that the uncertainty raises a problem, either under the present law or under the recommendations that we shall make.

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[96] Equity upheld the restrictive covenant in the nineteenth century, and Equity's doctrines were employed to uphold a restriction on user in *Lord Strathcona Steamship Co., Ltd. v. Dominion Coal Co., Ltd.*, [1926] 1 D.L.R. 873 (P.C.).

[97] Alberta Report, *supra*, note 58.

[98] See *supra*, note 66.

[99] *Supra*, notes 65 and 75.

[100] Variation of terms would also require court approval because, as the law stands, variation can only be carried out at common law after termination; variation is obtained in the resettlement.

Accordingly, we have concluded that the *Variation of Trusts Act* should be repealed and its provisions incorporated in the revised *Trustee Act*, but in an amended and expanded form, and we so recommend.[101] With respect to the variation of trusts, no substantial change in practice would occur. Arrangements for variation of trusts would be brought before the court for approval, and the former provisions of the *Variation of Trusts Act*, which would be contained in the revised *Trustee Act*, would complement the proposed power of the court to grant additional administrative powers.[102] As we discussed previously, it would depend, in all cases, upon the nature of the variation requested, and the interests involved, which judicial authority would be invoked to effect the variation.[103]

We have also concluded that the variation of trusts provisions should be expanded to provide that all terminations of trusts before the natural ending of the trust must be brought before the court for its consent, whether or not the beneficiaries are all capacitated. In this way, the court would have an opportunity to consider the intention or purpose of the settlor or testator and whether, in the light of all the circumstances at the time of the application to the court, those intentions should be supported or ignored. For the most part, it will be seen that the specific recommendations that we shall propose to implement our conclusions follow closely the legislative scheme adopted by the Alberta *Trustee Act*.[104] However, like the Manitoba Law Reform Commission, we shall also recommend several amendments to the Alberta provisions.

Accordingly, we recommend that the rule known as the rule in *Saunders v. Vautier* should be severely limited in its field of operation. The revised *Trustee Act* should, therefore, subject to several exceptions that we shall outline below, provide that a trust, whatever the nature of the interests created or the property involved and whether arising by will, deed or other disposition, shall not be varied or terminated before the natural ending of the trust without the approval of the court.[105]

In our view, it would be of assistance if the revised Act were to state expressly those situations in which termination under the rule in *Saunders v. Vautier* would no longer be possible, and those circumstances where questions are likely to arise with respect to the application of the proposed general provision just noted.

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[101] Draft Bill, ss. 64-67 and 90.2.

[102] *Ibid.*, s. 63. See, also, *supra*, ch. 4, sec. 3(e).

[103] See *supra*, this ch., sec. 2(a).

[104] See *supra*, note 65.

[105] Draft Bill, s. 64(1).

In particular, we recommend that the revised *Trustee Act* should provide that, without limiting the general prohibition against variation and premature termination of trusts except with the approval of the court, this prohibition should apply specifically to any interest under a trust whereunder the transfer or payment of capital or income is postponed to the attainment by the beneficiary of a stated age, or is postponed to the occurrence of a stated date or event or the passage of a stated period, or is to be made by instalments, or is subject to a discretion to be exercised during any period by executors or trustees as to the one or more persons who may be paid or receive the capital or income, or as to the time or times at which or the manner in which payments or transfers of capital or income may be made.[106] In addition, we recommend that the general prohibition against variation or premature termination without the court's consent should be stated specifically to apply to any variation or termination of a trust by merger, or by consent of all the beneficiaries, or by estoppel, or by a beneficiary renouncing his interest so as to cause an acceleration of remainder or reversionary interests, or to free any interest of an obligation charged upon it.[107]

As stated, we are of the view that there should be several exceptions to our proposed general prohibition against variation and termination of trusts without the approval of the court. As in the case of the Alberta legislation,[108] we recommend that, where a trust instrument contains a power whereby one or more persons who are able and willing to act may vary or terminate the trust or any of its terms, this should prevail over our general statutory provision.[109] This approach is consistent with the philosophy that, generally speaking, the revised *Trustee Act* should be subordinate to the wishes of the settlor or testator as expressed in the trust instrument.

Secondly, we have concluded that, unlike the position under the Alberta and Manitoba legislation, there are certain circumstances in which the present law – involving either the application of the rule in *Saunders v. Vautier* or an application to the court for the approval of a proposed arrangement – should continue to govern. In our view, the rule in *Saunders v. Vautier* should be abolished only in respect of one class of trusts, that is, express personal (or family) trusts. It is these trusts, even where they involve beneficiaries who are all of age, that we think should receive the careful and detached consideration the court already gives to personal trusts that involve minors and the unborn. Resulting or constructive trusts, on the other hand, are remedial trusts with their own particular attributes regarding the time of termination, and in our view they should continue to be governed by the present law. Accordingly, we recommend that our general prohibition against premature termination of a trust without the court's consent should not apply to resulting or constructive trusts.[110]

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[106] Draft Bill, s. 64(2)(*a*).

[107] *Ibid.*, s. 64(2)(*b*).

[108] Alberta *Trustee Act*, *supra*, note 65, s. 42(2). See, also, the Manitoba *Trustee Act*, *supra*, note 75, s. 61(2).

[109] Draft Bill, s. 64(3)(*c*).

[110] *Ibid.*, s. 64(3)(*a*).

In addition, we are of the view that our general proposal should not apply to the myriad of business and commercial trusts that have burgeoned in recent years. As we discussed in chapter 1 of this Report, the numerous business and commercial trusts that exist today have been developed to provide a specialized vehicle to meet particular needs in their respective areas, and a body of statute law has been promulgated to enable and regulate the majority of these trusts. Accordingly, we concluded that the very diversity of these business and commercial trusts militated against their inclusion within the confines of the revised *Trustee Act*. Moreover, as such trusts have their own location in various statutes, it would be logical for further provisions to be placed in the respective legislation. We also noted that, even though these are very specialized trusts, the law of trusts as established by the cases applies to them as to private individuals' trusts, including, in the present context, the rule in *Saunders v. Vautier*.

Therefore, in order not to disturb inadvertently the operation of this common law rule, among others, with respect to non-personal (or non-family) trusts that are subject to their own legislative framework, and because any changes in the applicable law of these trusts would be more appropriately accommodated in the relevant legislation, we recommended in chapter 1 of this Report that the revised *Trustee Act* should not apply to business, commercial, or investment trusts including, for example, pension trusts, employee benefit and profit sharing trusts, savings plan trusts registered under the *Income Tax Act* (Canada), trusts further to a buy-sell agreement, stock purchase agreement trusts, corporate bond trusts and voting trusts, but that a trust should not be excluded from the revised Act merely because it involves, in whole or in part, the carrying on of a business.[111] This recommendation would have the effect of excluding these types of trust from our recommendation that the rule in *Saunders v. Vautier* be abolished.

There is also the matter of the rule in *Barford v. Street*.[112] As noted previously, the Alberta legislation provides that "[w]hen an instrument creates a general power of appointment exercisable by deed, the donee of the power may not appoint to himself unless the instrument shows an intention that he may so appoint".[113] While the Manitoba Law Reform Commission recommended adoption of this provision,[114] it also pointed out that the need for the donor to evince this intention expressly in the trust instrument might well result in the same trap for the unwary draftsman as the rule in *Saunders v. Vautier*.[115] We find ourselves in agreement with this latter position and, accordingly, would permit the common law to continue to govern the exercise, and the consequences of the exercise, of a general power of appointment. We therefore recommend that the proposed general prohibition against variation or premature termination of a trust without court approval should not apply to a general power of appointment where the donee of the power, if he did not appoint to others, would be the sole beneficiary of the trust apart from those, if any, who would be entitled to the trust property on the failure of the donee to exercise the power of appointment.[116]

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[111] *Ibid.*, s. 1(*p*)(iii).

[112] *Supra*, note 32 and accompanying text.

[113] Alberta *Trustee Act*, *supra*, note 65, s. 42(8).

[114] The Manitoba legislature has, in fact, adopted the provision contained in the Alberta *Trustee Act*: see the Manitoba *Trustee Act*, *supra*, note 75, s. 61(9).

[115] Manitoba Report, *supra*, note 66, at 29.

Finally, there is the issue whether our proposed prohibition against the variation or termination of trusts without the court's approval should apply to trust instruments that are in effect at the present time. The Alberta Institute of Law Research and Reform recommended that the proposed abolition of the rule in *Saunders v. Vautier* should apply only to trusts arising after the coming into force of the relevant legislation.[117] However, both the Alberta *Trustee Act*[118] and the Manitoba legislation[119] apply their provisions to trusts arising before and after the commencement of the applicable section. The rationale for the latter approach is that effect should be given to the wishes of settlors and testators of all trusts, and not merely those that take effect after the proposed reforms are enacted.

It may be argued, on the other hand, that the rule in *Saunders v. Vautier* is both familiar to persons drafting trust instruments and of long standing. We are of the view that such a significant change in the law as the abolition of the rule should apply only with respect to trusts that take effect after the relevant legislation is enacted. This approach would permit those who are drafting trust instruments in the future to take this change in the law into account; instruments that are already drafted, but not yet in effect, could be amended, if, for example, the creator of the trust wished to provide an alternative mode of termination and variation to that provided under the proposed statutory provisions. Accordingly, we recommend that the revised Act should provide that the prohibition against variation and termination of trusts without the court's approval applies only to trust instruments that take effect after the revised Act comes into force.[120]

With respect to the scope of the power of the court under our general proposal, we would, as indicated, incorporate in the revised *Trustee Act* the provisions of the present *Variation of Trusts Act* permitting the court to consent to an arrangement on behalf of incapacitated beneficiaries, but in an expanded form to include our proposals concerning personal trusts whose beneficiaries are, *in toto*, adult and capable. We would not depart from the rule that *all* the adult and capable beneficiaries must consent to a proposed variation or termination of the trust. This is present practice and we think it is sound, because each such person has a property interest and should not have it changed or lessened without his consent. It is arguable that it should not be open to a single beneficiary, or even a minority of the adult and capable beneficiaries, effectively to be able to veto a variation or termination, but we have not been persuaded by this argument.

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[116] Draft Bill, s. 64(3)(*b*).

[117] Alberta Report, *supra*, note 58, at 16.

[118] Alberta *Trustee Act*, *supra*, note 65, s. 42(2).

[119] Manitoba *Trustee Act*, *supra*, note 75, s. 61(2).

[120] Draft Bill, s. 64(4).

Accordingly, we recommend that the revised *Trustee Act* should provide that, where property is held on trust under a will, deed or other disposition, the court may by order upon the application of any person approve any arrangement varying or terminating the whole or any part of a trust, or varying or enlarging the powers of the trustees to administer any of the trust property.[121] Before any arrangement is submitted to the court for approval, the arrangement should have the consent in writing of each capacitated person who is beneficially interested in the trust.[122] It should be noted that these proposals would clarify the law with respect to the situation where beneficiaries who are all adult and capable wish to vary the trust; they would be able to apply to the court under our proposals for approval of an arrangement to vary the trust.

We further recommend that, as under the present *Variation of Trusts Act*, the court should be empowered, in approving any arrangement, to consent on behalf of the following persons: any person who has an interest, whether vested or contingent, under the trust, who by reason of minority or other incapacity is incapable of consenting; any person, whether ascertained or not, who may become entitled to an interest under the trust as being, at a future date or on the happening of a future event, a person of a specified description or a member of a specified class of persons; any person whose whereabouts are unknown or who is unborn; or any person in respect of any interest of his that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined at the date of the application to the court.[123]

To meet the criticism that the court's position would be both paternalistic and somewhat ludicrous if it had to consider whether a proffered arrangement truly benefits adult and capable beneficiaries, we would make it clear that, insofar as such beneficiaries are concerned, the court would be expected to examine the evidence of the trust creator's intentions and the current circumstances of all the adult beneficiaries. The emphasis would be upon the existing terms of the trust; the court would have to be shown cause why those terms should not be followed through to their natural termination. Where the intention behind those terms is discoverable – from evidence by a living settlor, for example – the beneficiaries would also have to show why their circumstances justify a rearrangement which, in whole or in part, ignores that intention. The trust creator may not have known of those circumstances or foreseen future events; he may indeed have known or foreseen, as the case may be, but failed to appreciate the disadvantages created by the terms he has chosen. On the other hand, the beneficiaries may only be able to show, for instance, that they would sooner have capital now rather than later.

Where there is no evidence of intent other than the terms themselves, the nature of those terms would largely dictate the weight of the burden upon the beneficiaries. The presence of terms delaying vesting in possession to later ages or dates, or conferring dispositive discretions upon the trustees, would increase that burden; a life estate followed by a vested fee simple remainder, on the other hand, would present a less formidable burden. If no evidence of intention is forthcoming, either from the trust instrument or from other admissible evidence, then in most cases the beneficiaries would probably have little difficulty in obtaining the court's approval. However, subtle pressures upon the elderly,[124] or those who have just come of age,[125] are not unimaginable, even where evidence of intention is absent, and we would like to see the courts in a position to play the traditional role of an Equity court in the presence of such factors.

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[121] *Ibid.*, s. 65(1).

[122] *Ibid.*, s. 65(2).

[123] *Ibid.*, s. 65(3).

We therefore recommend that the court should not approve an arrangement unless it is satisfied that the carrying out of the arrangement appears to be for the benefit of each person on behalf of whom the court may consent, and that having regard both to the intentions of the settlor or testator in creating the trust and to all the circumstances of any beneficiary on whose behalf the court has not provided the required consent, the arrangement is one that ought to be approved.[126]

If a living settlor desires to do so, we recommend that he should be able to give evidence concerning his intentions and his views on the proposed arrangement, and that any evidence concerning the intentions of a living, but incapacitated, settlor, or of a testator, should be presented to the court.[127]

We are also of the view that the provision in the present *Variation of Trusts Act* to the effect that the court need not be concerned with the benefit of those persons who are members of a discretionary trust class, but whose interest is contingent upon attempted alienation or bankruptcy by the preceding interest holder, the protected life tenant, should be eliminated.[128] That is, not only should the court be empowered to approve an arrangement on behalf of such persons, but the court should also have to consider whether the arrangement is for those persons' benefit. The present provision is derived from the English *Variation of Trusts Act, 1958*,[129] which no doubt contains this exception because the statutory protective trust in England[130] installs the next-of-kin of the protected life tenant as the discretionary trust beneficiaries, if he is without children and unmarried. The next-of-kin are there merely to enable the statutory trust to provide protection for the life tenant. In Canada, this type of trust is not statutory, as we have earlier noted,[131] and, where it is imported expressly into any trust instrument, there is normally concern on the part of the settlor or testator for the "spendthrift's" immediate family. We therefore recommend that the court should consider the benefit of these persons, the discretionary trust class.[132] We have observed that the recent Alberta and Manitoba legislation has done the same thing.[133]

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[124] *Re Steed's Will Trusts*, *supra*, note 88.

[125] *Kinnee v. Public Trustee for Alberta*, *supra*, note 87.

[126] Draft Bill, s. 65(4).

[127] *Ibid.*, s. 65(5).

[128] *Variation of Trusts Act*, *supra*, note 3, s. 1(1)(*d*) and (2).

[129] *Variation of Trusts Act, 1958*, *supra*, note 4, s. 1(1)(*d*).

[130] *Trustee Act, 1925*, *supra*, note 12, s. 33.

[131] See, *supra*, ch. 5, sec. 4.

In addition to the power conferred upon the court by the present *Variation of Trusts Act* to vary or revoke all or any of the trusts and to enlarge the administrative powers of trustees, we are of the view that the court should be able to permit the resettlement of the assets of trusts that are being varied or terminated. A comparison of *Re Towler's Settlement Trusts*[134] and *Re Ball's Settlement Trusts*[135] demonstrates the narrow line that exists between settling an absolute interest, on the one hand, and varying to the point of rebuilding a trust, on the other. In view of *Re Davies*[136] and *Re Mitchell*[137] in this jurisdiction, and the conclusion that an absolute interest can be settled in a "very special case", we would confer upon the court a power to resettle so that appropriate arrangements can be approved without there being a concern for jurisdiction. Accordingly, we recommend that the revised Act should provide that the court may, by order, upon the application of any person, approve any arrangement resettling any interest under the trust.[138]

We wish also to deal with the difficulty that can arise where there is an application to the court for approval of an arrangement involving minors or incapacitated persons, but there is no trust on the face of the instrument to be "arranged".[139] We are of the view that the court should have jurisdiction to approve an arrangement under these circumstances, but that this power should be restricted to testamentary documents because that is where the problem seems to arise. Accordingly, we recommend that, where a will does not contain a trust, but the court is satisfied, having regard to the circumstances and the terms of a gift or devise, that it would benefit a minor or other incapacitated beneficiary if the court were to approve an arrangement whereby the property or interest taken by that beneficiary under the will would be held on trusts during the period of incapacity, the court should be able to approve such an arrangement.[140]

There is a problem, discussed in the English cases,[141] with respect to whether the court's order brings about the variation or termination approved, or whether further documentation is needed from the adult and capable beneficiaries.[142] The Report of the Manitoba Law Reform Commission noted this problem,[143] and the recent amendments to the Manitoba *Trustee Act* provide that, where the court approves an arrangement to vary or terminate a trust, the arrangement takes effect on the date of order unless some other date for the arrangement is set out in the order.[144] Because all adult and capable beneficiaries, excluding those who cannot be traced, would be required under our recommendations to give their written consents before the court's approval is sought, there can be no objection to the court's order being the instrument that executes the variation or termination. Accordingly, we recommend that an order approving an arrangement should have the effect of executing the variation or termination, as the case may be, so that no further act on the part of any person is necessary to carry out the variation or termination of the trust in question.[145]

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[132] Draft Bill, s. 65(4)(*a*). Unlike s. 1(2) of the *Variation of Trusts Act*, *supra*, note 4, s. 65(4)(*a*) of the revised *Trustee Act* provides that the court must consider the benefit to be derived by each person on behalf of whom the court may consent in s. 65(3), which includes, in s. 65(3)(*d*), a beneficiary of a discretionary trust class.

[133] Alberta *Trustee Act*, *supra*, note 65, s. 42(5)(d), and the Manitoba *Trustee Act*, *supra*, note 75, s. 61(7).

[134] [1964] Ch. 158, [1963] 3 All E.R. 759.

[135] [1968] 1 W.L.R. 899, [1968] 2 All E.R. 438 (Ch. D.).

[136] *Re Davies*, [1968] 1 O.R. 349, 66 D.L.R. (2d) 412 (H.C.J.).

[137] [1969] 2 O.R. 272, 5 D.L.R. (3d) 123 (H.C.J.). See, also, Waters, *supra*, note 3, at 919-20.

[138] Draft Bill, s. 65(1).

[139] *Re Davies*, *supra*, note 136. See, also, Waters, *supra*, note 3, at 919.

[140] Draft Bill, s. 65(6).

[141] See *Underhill's Law relating to Trusts and Trustees*, *supra*, note 3, at 388-92.

The *Variation of Trusts Act* was not designed to deal with purpose trusts.[146] In any event, the court has a considerable inherent jurisdiction in relation to charitable purpose trusts, of which, in our opinion, account ought to be taken when it is proposed to confer a statutory jurisdiction upon the courts in this respect. Moreover, as we stated in chapter 1 of this Report, because of the unique and diverse body of law that governs charitable trusts, we are of the view that, until this topic has been examined in detail, the revised *Trustee Act* should not apply generally to charitable trusts or non-charitable purposes. Nonetheless, while we shall not deal, for example, with the termination of charitable trusts, there is undoubtedly a need for legislation that will broaden the existing inherent jurisdiction of the courts to approve schemes for the reorganization and variation of charitable trusts, and we shall turn to this matter in the next chapter of this Report.

Where, however, a charitable organization, being either a corporation or a trust, wishes, for example, to consent to any arrangement as a beneficiary, the legislation authorizing the court to approve on behalf of those who cannot consent for themselves should make clear the position of a charity. Is the charity a beneficiary that is "adult and capable" so that it consents or withholds its consent without the aid of the court, or should the charity have to have the consent of the court before the character, and perhaps the extent, of its property interests are changed by any arrangement? We can see no need for such a consent. The courts have never questioned the capacity of a charitable corporation or trust to take advantage of the rule in *Saunders v. Vautier*.[147]

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[142] Under the present law the court has no jurisdiction to overrule the trustees if they wish to exercise a discretion given by the trust instrument: see *Re Steed's Will Trusts*, *supra*, note 88. The effect of our recommendation is that the court's order would overrule any provision in the trust instrument to which it refers, and the trustees would not therefore be able to exercise a discretion which was eliminated by the order.

[143] Manitoba Report, *supra*, note 66, at 25.

[144] Manitoba *Trustee Act*, *supra*, note 75, s. 61(11).

[145] Draft Bill, s. 65(7).

[146] There are a few unreported cases in which Ontario courts have varied charitable trusts under this Act, but it must be highly questionable whether the Act confers this jurisdiction upon the courts.

[147] See, for example, *Wharton v. Masterman*, *supra*, note 36.

However, although the English *Variation of Trusts Act, 1958* leaves this to be assumed, we find ourselves in agreement with the Alberta legislation, which makes clear that the terms, "beneficiary" and "person", include a charitable corporation or trust.[148] Accordingly, we recommend that, for the purpose of our recommendations concerning variation or premature termination of a trust, a "beneficiary" or "person" should include a charitable corporation or trust; however, we do not believe that these recommendations should be used for the variation or termination of a charitable trust, and we so recommend.[149]

Finally, we are of the view that the operation of the perpetuity rule and the *Accumulations Act* should be clarified where a variation or termination of any part of a trust has occurred. We recommend that, for the purpose of the rules against perpetuities and accumulations, time should run under our proposed provisions from the date of the order of the court approving an arrangement, unless the nature of the variation or of the termination of any part of any trust is such that the court considers time should continue to run as though no variation or termination in part had occurred, and in this latter case the order should so state.[150]

RECOMMENDATIONS

The Commission makes the following recommendations.

1. The present *Variation of Trusts Act* should be repealed and its provisions incorporated in the revised *Trustee Act*, but in an amended and expanded form.

2. The rule known as the rule in *Saunders v. Vautier* should be severely limited in its field of operation. Accordingly, the revised Act should contain a provision to the effect that, subject to the proposals contained in Recommendations 5 to 9, a trust, whatever the nature of the interests created or the property involved, and whether arising by will, deed or other disposition, shall not be varied or terminated before the natural ending of the trust without the approval of the court.

3. Without limiting the general prohibition against variation and premature termination of a trust without the approval of the court, Recommendation 2 should be stated in the revised Act to apply specifically to any interest under a trust whereunder the transfer or payment of capital or income is postponed to the attainment by the beneficiary of a stated age, or is postponed to the occurrence of a stated date or event or to the passage of a stated period, or is to be made by instalments, or is subject to a discretion to be exercised during any period by executors or trustees as to the one or more persons who may be paid or receive the capital or

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[148] Alberta *Trustee Act*, *supra*, note 65, s. 42(1).

[149] Draft Bill, s. 66.

[150] *Ibid.*, s. 67.

income, or as to the time or times at which or the manner in which payments or transfers of capital or income may be made.

4. The revised Act should provide that the general prohibition against variation and premature termination of a trust without the court's consent, contained in Recommendation 2, should apply to any variation or termination of a trust by merger, or by consent of all the beneficiaries, or by estoppel, or by a beneficiary renouncing his interest so as to cause an acceleration of remainder or reversionary interests, or to free any interest of an obligation charged upon it.

5. The revised *Trustee Act* should provide that Recommendation 2 does not apply where a trust instrument contains a power whereby one or more persons who are able and willing to act may vary or terminate the trust or any of its terms.

6. The revised *Trustee Act* should provide that Recommendation 2 does not apply to resulting or constructive trusts.

7. The revised *Trustee Act* should provide that Recommendation 2 does not apply to business, commercial, or investment trusts, including, for example, pension trusts, employee benefit and profit sharing trusts, savings plan trusts registered under the *Income Tax Act* (Canada), trusts further to a buy-sell agreement, stock purchase agreement trusts, corporate bond trusts and voting trusts. However, a trust should not be excluded from Recommendation 2 merely because the trust property involves, in whole or in part, the carrying on of a business.

8. The revised *Trustee Act* should provide that the proposed general prohibition against variation and premature termination of a trust without the court's approval, contained in Recommendation 2, does not apply to a general power of appointment where the donee of the power, if he did not appoint to others, would be the sole beneficiary of the trust, apart from those, if any, who would be entitled to the trust property on the failure of the donee to exercise the power of appointment.

9. The revised *Trustee Act* should provide that the prohibition against variation and termination of trusts without the court's approval contained in Recommendation 2 applies only to trust instruments that take effect after the revised Act comes into force.

10. The revised *Trustee Act* should provide that, where property is held on trust under a will, deed or other disposition, the court may by order, upon the application of any person, approve any arrangement varying or terminating the whole or any part of a trust, or varying or enlarging the powers of the trustees to administer any of the trust property.

11. The revised *Trustee Act* should provide that, before an arrangement is submitted to the court for approval, the arrangement must have the consent in writing of each capacitated person, other than a person mentioned in Recommendation 12 on whose behalf the court may consent, who is beneficially interested in the trust.

12. The revised *Trustee Act* should provide that, in approving any arrangement under Recommendation 10, the court may consent on behalf of the following persons: any person who has an interest, whether vested or contingent, under the trust, who by reason of minority or other incapacity is incapable of consenting; any person, whether ascertained or not, who may become entitled to an interest under the trust as being, at a future date or on the happening of a future event, a person of a specified description or a member of a specified class of persons; any person whose whereabouts are unknown or who is unborn; or any person in respect of any interest of his that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined at the date of the application to the court.

13. The revised *Trustee Act* should provide that the court shall not approve an arrangement unless it is satisfied that the carrying out of the arrangement appears to be for the benefit of each person on behalf of whom the court may consent under Recommendation 12, and that, having regard both to the intentions of the settlor or testator in creating the trust and to all the circumstances of any beneficiary on whose behalf the court does not provide the required consent, the arrangement is one that ought to be approved.

14. The revised *Trustee Act* should provide that, if a living settlor desires to do so, he may give evidence concerning his intentions and his views on the proposed arrangement, and that any evidence of the intentions of a living, but incapacitated, settlor, or of a testator, should be presented to the court.

15. The revised *Trustee Act*, unlike the present *Variation of Trusts Act*, should require that the court consider the benefit to be derived by those persons who are members of a discretionary trust class, when consenting on their behalf to a proposed variation or termination of a trust.

16. The revised Act should provide that the court may, by order, upon the application of any person, approve any arrangement resettling any interest under the trust.

17. The revised *Trustee Act* should provide that, where a will does not contain a trust, but the court is satisfied, having regard to the circumstances and the terms of a gift or devise, that it would benefit a minor or other incapacitated beneficiary if the court were to approve an arrangement whereby the property or interest taken by that beneficiary under the will would be held on trust during the period of incapacity, the court may approve such an arrangement.

18. The revised *Trustee Act* should provide that an order approving an arrangement has the effect of executing the variation or termination, as the case may be, so that no further act on the part of any person is necessary to carry out the variation or termination of the trust in question.

19. The revised *Trustee Act* should provide that, for the purpose of our recommendations concerning variation or premature termination of a

trust, a "beneficiary" or "person" includes a charitable corporation or trust, but that the court shall not approve a variation or termination of a charitable trust under these recommendations.

20. The revised *Trustee Act* should provide that, for the purpose of the rules against perpetuities and accumulations, time runs under our proposed provisions concerning variation and termination of trusts from the date of the order of the court approving an arrangement, unless the nature of the variation or of the termination of any part of any trust is such that the court considers that time should continue to run as though no variation or termination in part had occurred, and in this case the order must so state.

CHAPTER 8

CHARITABLE TRUSTS AND NON-CHARITABLE PURPOSE TRUSTS

1. INTRODUCTION

It will be recalled that in chapter 1 of this Report we discussed the types of trust that should be comprehended by the revised *Trustee Act*. Generally speaking, the Commission expressed the view that the provisions of the revised *Trustee Act* should not apply to charitable trusts and non-charitable purpose trusts. We noted that these types of trust are governed, at present, by a unique body of case law[1] and diverse statutory provisions,[2] which, we were of the opinion, should be examined *in toto* before reform of this area of the law is undertaken.[3]

Nevertheless, the Commission has concluded that the revised Act could usefully provide guidance in two areas where difficulties appear to have arisen, without impeding eventual reform of the law of charities: namely, the variation and reorganization of charitable trusts, and the remedying of provisions containing mixed charitable and non-charitable purposes, that is, imperfect trust provisions. Accordingly, we recommended in chapter 1 of this Report that, until the topic of charity law reform has been examined in detail, the revised *Trustee Act* should not apply to charitable trusts or non-charitable purpose trusts, except to provide specific provisions for the variation and reorganization of charitable trusts, and the remedying of imperfect trust provisions.[4]

2. IMPERFECT TRUST PROVISIONS

In this section of the chapter, we shall examine trusts that provide for both charitable and non-charitable purposes, that is, trusts containing imperfect trust provisions. Before discussing these provisions in detail, however, a brief outline, by way of background, of the elements of charitable trusts and non-charitable trusts, will be useful.

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[1] See Waters, *Law of Trusts in Canada* (1974), ch. 14.

[2] For example, trusts for the upkeep of graves and tombs are governed by the *Cemeteries Act*, R.S.O. 1980, c. 59. Some provision is made for charitable trusts under the terms of the *Charitable Gifts Act*, R.S.O. 1980, c. 63, and the *Charities Accounting Act*, R.S.O. 1980, c. 65, as am. by S.O. 1982, c. 11.

[3] See, for example, Cullity, "Statutory Machinery for Supervising Charities" (1972), 1 The Philanthropist 22.

[4] Draft Bill, s. 1(*p*)(i).

(a) CHARITABLE TRUSTS AND NON-CHARITABLE TRUSTS

Trusts may have as objects either persons or purposes.[5] A trust for persons may provide, for instance, as follows: to A for life, remainder to her children absolutely. A trust for purposes, on the other hand, sets forth a task that the settlor or testator wishes the trustees to carry out or finance, using the trust property to that end: for example, "for the relief of want among low-income families", or "for the training of journalists in the newspaper industry". It may indeed be the case that human beings are to benefit as a consequence of the carrying out or financing of the purpose, but the trust object is an abstract purpose, whether or not the human beings who will ultimately benefit can be ascertained when the trust takes effect. If the trust objects are persons, like A and her children, she and her children are the objects. Where there is doubt whether the trust is for persons or purposes, the test is whether the trust object or objects can sue the trustees to compel proper trust administration; persons obviously can sue, purposes cannot.[6]

It must be remembered that persons include not only human beings, but also incorporated bodies. A corporation may, therefore, be the object of a trust, given legal personality by charter or under the authority of statute. A corporation may be defined as a purpose, the purpose to be carried out or financed by a single human being, or an aggregation of human beings who own the corporate entity.

The distinction between an outright gift and a gift by way of trust must also be remembered. An outright gift may be made to a human being, a corporation,[7] or an existing trust.[8] Whether the human being has the capacity to receive, or the corporation is empowered to receive, or the trust is valid and the trustees empowered to receive, are issues distinct from the validity of the gift, or the mode of giving, itself. Provided the human being is capacitated, the corporation is empowered, and the trust is valid and the trustees authorized to receive, and provided also that the requirements of the chosen mode of giving are satisfied, the outright gift cannot be questioned. That is to say, the purpose or purposes of the corporation, and the objects of the trust, are not involved, and, therefore, the donor can rest content that the validity of his gift will not be put in question by the invalidity of one or more of the corpoxate purposes or trust objects.

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[5] For a fuller discussion of the nature of possible trust objects, see Mowbray (ed.), *Lewin on Trusts* (16th ed., 1964), at 16-19; Meagher and Gummow, *Jacobs' Law of Trusts in Australia* (4th ed., 1977), at 137-38 and 213-18; and Waters, *supra*, note 1, at 113-19.

[6] *Morice v. Bishop of Durham* (1804), 9 Ves. Jun. 399, 32 E.R. 656, aff'd (1805), 10 Ves. Jun. 522, 32 E.R. 947. In that case, the gift was to the Bishop "for such objects of benevolence and liberality" as he should approve.

[7] A corporation may include a number of human beings, corporations, or existing trusts. In the case of an outright gift, the corporation can expend the property at once and at its will: see, for example, *Re Delaney Estate* (1957), 26 W.W.R. 69; *sub nom. R.C. Archiepiscopal Corp. of Winnipeg v. Ryan*, 12 D.L.R. (2d) 23 (B.C.C.A.).

[8] See Waters, *supra*, note 1, at 482-83 and 484.

However, where property is given to a corporation or a trust as trustee for the purposes of the corporation or trust, difficulties can arise; the same difficulties will arise where property is transferred to a human being or to a corporate trustee on trust for purposes. In each case, the trust instrument or words of gift, properly construed, give rise not to an outright, or absolute, gift, to which the donor may or may not have attached some description of his motives, but to a gift by way of trust – a trust for purposes. Purposes as trust objects are not motives; they are more. They are the terms of the gift. The recipient is legally obligated to apply the property he receives to the attainment of those purposes.

A trust for purposes involves practical problems because, as we have seen, the object or objects of the trust are inanimate, and, therefore, there is no one who can compel the trustees to discharge their duties with regard to the purpose or purposes.[9] From the earliest days of the trust, the courts saw this as a problem, and, consequently, the general rule was established that a trust for purposes is invalid. The pressure for the recognition by the courts of trusts for charitable purposes was considerable, however, as one would expect in the context of seventeenth and eighteenth century English society. When the Crown, as *parens patriae*, demonstrated its willingness through the Attorney General to act on behalf of charitable purposes, the courts were immediately able to find such trusts to be enforceable, and therefore valid. As a result, trusts for non-charitable purposes alone remained unenforceable, and therefore invalid.

But what are charitable purposes? What is "charity"? In addition to the requirement of public benefit, the courts have developed, over the years, descriptions of the kinds of purpose that will be held to come within the meaning of charity. Lord Macnaghten, in *The Commissioners for Special Purposes of the Income Tax v. Pemsel*, set forth the following well known and generally accepted classification of charity:[10]

> 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.

But to say that charity is concerned with the advancement of education or of religion, the relief of poverty, or such other purposes as fall within, for example, the "spirit and intendment" of the purposes set out in the preamble to the *Charitable Uses Act, 1601*,[11] is to say no more than that the courts have these matters in mind when they set out to determine whether a particular trust purpose is or is not charitable.

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[9] *Morice v. Bishop of Durham*, *supra*, note 6. For a discussion of the principles involved in this leading authority, see McMullen, Maurice and Parker (eds.), *Tudor on Charities* (6th ed., 1967), at 137-40, and Meagher and Gummow, *supra*, note 5, at 217-18. Trust objects, whether for persons or purposes, except those that are exclusively charitable, are subject to the rule against indefinite duration. This is sometimes referred to as the rule against perpetuities, or the rule against inalienability, but both of these would appear to be improper terminology: see Morris and Leach, *The Rule Against Perpetuities* (2d ed., 1962), at 188-89.

[10] *The Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A.C. 531 (H.L.), at 583.

Time and experience have shown that probably no definition of charity can be fashioned that would be anything other than a broad generalization of little or no value in determining whether a particular purpose should qualify as a charitable activity. A definition must include the innumerable and diverse pursuits that can legitimately fall within the above description of charity, and it must accommodate the fact that the concept of what is charitable activity will change with the evolution of society and different needs. Despite considerable effort in numerous jurisdictions, not one has adopted a statutory definition of charity.[12]

There are significant advantages attached to a charitable trust. Considerable income tax relief is granted by federal and Ontario legislation to "charities",[13] and under the case law charitable trusts are not required to satisfy the same level of certainty of objects as other trusts. Provided it is clear that trust property is exclusively dedicated to charity, there need be no designation in the trust terms of specific charitable objects. Under the inherent scheme-making power of the court, the charitable objects can be designated. Moreover, the rule against perpetuities is applied with concessions to charitable trusts, while the rule against perpetual duration does not apply at all. A charitable trust, and a charitable corporation, may be endowed in perpetuity by the donor's gift.[14] Only by way of exception under the taxing legislation, and not at all under the case law, do those non-charitable purpose trusts that are valid have any of these advantages.

During the nineteenth century, a number of non-charitable purpose trusts were recognized as valid, but these were all testamentary trusts and the courts of first instance only recognized the specific circumstance before the court; there was no generalization.[15] The list of exceptions is composed of trusts for the erection or maintenance of particular monuments or graves, trusts for the saying of masses (to the extent these are not charitable),[16] trusts for the benefit of particular animals, trusts for the benefit of unincorporated associations with non-charitable purposes (although this exception is subject to several important qualifications, which may prove fatal),[17] and finally, it would seem, trusts for the promotion and furtherance of fox-hunting.[18] In recent years in England, although this line of analysis has yet to be commented upon by Canadian courts, the judicial suggestion has been made that, where a testamentary trust or *inter vivos* trust, "though expressed as a purpose, is directly or indirectly for the benefit of an individual or individuals", the trust is not affected by the factors that render non-charitable trusts invalid.[19]

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[11] 43 Eliz. 1, c. 4.

[12] A jurisdiction could give statutory effect to the four-fold description of charity by Lord Macnaghten given above in *The Commissioners for Special Purposes of the Income Tax v. Pemsel*, *supra*, note 10, which itself was based upon Sir Samuel Romilly's argument as counsel in *Morice v. Bishop of Durham*, *supra*, note 6, but this description is not a definition.

[13] The term "charities" is employed by the *Income Tax Act* (Canada), S.C. 1970-71-72, c. 63, as am., s. 149.1(1). Relief from tax is given not only to "charitable organizations" and "charitable foundations" in the form of trusts and gifts to such trusts, but to "charitable organizations" and "charitable foundations" in the form of corporations whose objects are exclusively charitable, and outright gifts to such corporations. See, further, Drache, *Canadian Tax Treatment of Charities and Charitable Donations* (2d ed., 1980).

[14] See Morris and Leach, *supra*, note 9, at 188-89.

[15] In *Re Endacott*, [1960] Ch. 232, [1959] 3 All E.R. 562, the Court of Appeal in England said the list would not be extended any further. Even if a non-charitable purpose trust were recognized, it might yet fail for uncertainty of objects or breach of the perpetuity rule.

Whether this last instance would be upheld in Canadian common law courts, and whether the other exceptions have the same limits in Canada, are not questions that we need pursue here. The point that we would make is that, if trust purposes are not charitable, the validity of the trust objects is at best questionable, and, if no common law exception is applicable, the trust is invalid.[20] In the latter circumstances, the would-be trust property reverts to the settlor or to the testator's estate.

In recent years, however, Ontario has responded in some measure to the practical difficulties faced by non-charitable purpose trusts. The *Perpetuities Act*, which came into force in 1966, provides that trusts for "specific" non-charitable purposes shall take effect as powers of appointment vested in the trustees.[21] Such trusts may last no longer than twenty-one years, and at the end of that period, or a lesser time period designated by the trust instrument, any income or capital remaining in the trust passes to those persons who would have taken the trust property if it had been invalid from the beginning. While the Act does not define the word "specific", it is clear that the term is not restricted to those purposes that are recognized as valid by the existing case law.[22] The Act further provides that total failure of a specific non-charitable purpose will also occur if the trust is expressed to be of perpetual duration, and the court is of the opinion that the voiding of the limitation would more closely approximate the intention of the settlor or testator than giving the limited effect to the trust that the Act permits.[23]

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[16] See *In Re Caus*, [1934] Ch. 162, [1933] All E.R. Rep. 818. However, this case may not have survived *Gilmour v. Coats*, [1949] A.C. 426, [1949] 1 All E.R. 848 (H.L.), although the *Gilmour* decision has itself been questioned, and might not be followed in Canada. See *Re Hallisy*, [1932] O.R. 486, [1932] 4 D.L.R. 516 (C.A.). For an explanation of these cases, see Waters, *supra*, note 1, at 485-86.

[17] See, further, *Tudor on Charities*, *supra*, note 9, at 148-59, and Meagher and Gummow, *supra*, note 5, at 121-22 and 215-16.

[18] *In re Thompson*, [1934] Ch. 342, [1933] All E.R. Rep. 805. With respect to these "unenforceable trusts", see Pettit, *Equity and the Law of Trusts* (4th ed., 1979), at 39-44.

[19] *Re Denley's Trust Deed*, [1969] 1 Ch. 373, at 383-84, [1968] 3 All E.R. 65, at 69.

[20] See Waters, *supra*, note 1, at 505-07.

[21] *Perpetuities Act*, R.S.O. 1980, c. 374, s. 16. See, also, Ontario Law Reform Commission, *Report No. 1 [The Rule Against Perpetuities]* (1965), which was the basis for the 1966 legislation, *The Perpetuities Act, 1966*, S.O. 1966, c. 113.

[22] Ontario Law Reform Commission, *Report No. 1*, *supra*, note 21, at 35-41.

[23] *Perpetuities Act*, *supra*, note 21, s. 16(1).

Nevertheless, despite the alleviating provisions of the *Perpetuities Act*, the penalty paid by a settlor or testator who fails to discern correctly the limits of what in law is charitable is considerable. Moreover, as the situation exists today, the law concerning what purposes are charitable has reached a disturbing degree of technicality, and traps abound for the unwary donor. If the settlor or testator is anxious to benefit others in some particular manner, as, for instance, by the provision of prizes for those placing first and second each year in the final entrance examinations held by a particular profession, he may be under the impression that this purpose is charitable. Unless the court is of the view that the purpose is specific within the meaning of the *Perpetuities Act*, however, the trust will be invalid. The imprecision of the scope of charity renders errors of this kind quite possible, even though the donor's adviser may be well versed in charity law.

Where only one purpose is involved, the validity of the purpose is dependent upon its classification as either exclusively charitable, or as exclusively specific non-charitable, in which case the purpose will be valid, or as non-specific and non-charitable, in which case the purpose will be void. The situation is more complex, however, where two or more purposes are involved. It is trusts that are found to provide for both charitable and non-charitable purposes, that is, those that contain imperfect trust provisions, to which we turn our attention in the remainder of this section.

(b) MIXED CHARITABLE AND NON-CHARITABLE PURPOSES

As we have stated, in order for a trust to be valid as a charitable trust, the trust purposes must be exclusively charitable. If the trust property, or any part of it, may, in the trustees' discretion, be expended upon a non-charitable purpose, the whole trust fails. It is therefore the trust for several purposes that is likely to prove the greatest trap for the settlor or testator. And it is not merely that the adviser may ultimately be proved to have counselled wrongly that a particular purpose is charitable, or that the draftsman worded a would-be charitable gift in such a way that it became non-charitable. This fate could overtake a trust for a single purpose. The particular trap to which we are now referring arises from the manner and number of ways in which the courts have held that mixed charitable and non-charitable purpose trusts can come into existence. The following are examples, not necessarily exhaustive, of mixed charitable and non-charitable purposes:

(1) Property is given on trust for purposes described by a single compendious term, which includes purposes that are not charitable, as well as those that are. For instance, purposes that are "worthy", "benevolent", "patriotic", "philanthropic", or "public".[24] In some cases, the trust

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[24] See, for example, *Leahy v. A.G. for N.S.W.*, [1959] A.C. 457, at 474-76, [1959] 2 All E.R. 300, at 302-03 (P.C.) ("for benevolent purposes"); *Re Young* (1907), 9 O.W.R. 566 (H.C.J.) ("needy and worthy"); and *Re Street* (1926), 29 O.W.N. 428 (H.C. Div.) ("benevolent" institutions).

contains one of these terms; in others, two or more are joined disjunctively with a term exclusively denoting charity: for example, "for charitable or worthy purposes", "for charitable, philanthropic, or other worthy purposes".[25]

(2) The objects of the trust constitute a list of specific purposes, some of which are charitable and others which are not: for instance, "for the provision of university scholarships, for the furtherance of the professional education of articled law students, and for the promotion of student health".

(3) One purpose is the relief of need, and the persons to be benefited are bound by a common nexus, but other purposes are added: for example, "for the relief of need, and the provision of instruction in arts and crafts, among retired employees of the XYZ Co".[26]

(4) Property is given to an official of an institution, or to an institution itself, and it is declared that the official or institution respectively is to hold the property on trust for the purposes for which the institution in question exists. These purposes are not exclusively charitable: for example, "to the Minister of the Bennett Road United Church for his work in the locality"; or "to the Fairway Club for its purposes". The minister's work embraces activity which is not included within the advancement of religion, and the Club exists to promote charitable activities and the social pleasure of its members.[27]

(5) Trustees are given a discretion to distribute the funds to one or more organizations of a certain description, some of which have exclusively charitable purposes, but others which do not: for example, "for such order of nuns of the Catholic Church as my executors and trustees shall select". Those orders engaged in the relief of poverty, nursing, education, or social welfare are charitable, whereas closed orders, that is, those engaged solely in prayer and contemplation, have been held not to be charitable.[28]

(6) The trust does not provide for the "promotion" or "furtherance" of charity, but the settlor or testator has used such terms as "aiding", "assisting", or "conducive" to charity.

In each of these instances, it is possible for all or some part of the benefit of the trust property to enure to the advantage of non-charitable objects, and therefore the whole trust fails.

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[25] See, for example, *Chichester Diocesan Fund v. Simpson*, [1944] A.C. 341, [1944] 2 All E.R. 60 (H.L.) ("for charitable or benevolent purposes"); *Re Eacrett*, [1949] O.R. 1, [1949] 1 D.L.R. 305 (C.A.) (for "such charitable purposes or for civic betterment or for the relief of poverty"); and *Re Poole* (1931), 40 O.W.N. 558 (H.C.J.).

[26] See, for example, *In re Cox*, [1955] A.C. 627, [1955] 2 All E.R. 550, [1955] 3 D.L.R. 497 (P.C.), aff'g [1953] 1 S.C.R. 94, [1953] 1 D.L.R. 577 ("for charitable purposes only" among past, present and future employees of The Canada Life Assurance Co. and their dependants).

[27] See, for example, *Dunne v. Byrne*, [1912] A.C. 407, [1911-13] All E.R. Rep. 1105 (P.C.). See, also, *Tudor on Charities*, *supra*, note 9, at 143.

[28] *Leahy v. A.G. for N.S.W.*, *supra*, note 24. See, also, *Gilmour v. Coats*, *supra*, note 16.

(c) PRESERVING THE CHARITABLE ELEMENT UNDER THE LAW OF EQUITY

In some instances the courts have saved the charitable element by discovering in the language of the settlor or testator an intention that some purposes shall be primary and others ancillary, or that there shall be an apportionment by the trustees among the stated purposes.

If the trust instrument makes a gift of the entire fund to charity, subject to payments to one or more non-charitable purposes, and these purposes fall outside the valid forms of non-charitable purposes, the fact that the non-charitable purposes are void enables the whole fund to be expended upon the charitable purposes. However, this result cannot occur if the proper construction of the instrument is that only the balance of the fund is to be expended upon the charitable purposes, and that balance cannot be ascertained or quantified. Of course, if quantification is possible, the charitable part of the trust can be saved.[29] In yet other cases, the courts have been able to find primary objects and ancillary objects. Ancillary objects do not characterize the trust as charitable or non-charitable, and, therefore, if the primary purposes are charitable, the ancillary purposes,[30] albeit non-charitable, can be ignored. Moreover, this classification of objects is possible whether the trust is for two or more purposes, or for an institution, some of whose purposes are charitable, others non-charitable.[31] It will be evident that, since these cases turn on construction of intention, a fine line of interpretation will often distinguish one case from another.

Apportionment is possible where the testator or settlor has directed that the trust fund shall be apportioned, or divided, among the stated objects. It is where the trustees are given a discretion that enables them to expend the total fund upon a non-charitable purpose, and that purpose is not within the purpose permitted by the case law or statute, that the trust fails.[32] However, where there is a direction to apportion, the trust instrument need not state what proportions the settlor or testator intends; if there is nothing to suggest what is to be done, the court presumes an intention of an equal division.[33] An intention that there shall be a division is the essential element. Where the courts can so apportion, the charitable part of the trust is saved, and only the non-charitable part will fail.

The courts might also have been expected to say that, where the trustee has a power to choose among a list of charitable and non-charitable purposes, the charitable element may be saved where there is an implied gift over on default of appointment to those purposes equally. If the power is not exercised, apportionment would then be possible. However, although the courts have implied such a trust on default of appointment where the trust objects are persons,[34] the courts have not been willing to make such an implication where the trust objects are purposes. For instance, if the executor and trustee have a power to choose "such charitable or benevolent purposes" as they will, the courts will not imply a trust for equal division if the power is not exercised. The courts take the view that the purposes are too vague and indefinite for the court to execute the trust.[35]

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[29] *In re Parnell*, [1944] Ch. 107. But see *In re Vaughan* (1886), 33 Ch. D. 187.

[30] Ancillary purposes are construed as mere means for the attainment of the main, or charitable, purposes: see *In re Coxen*, [1948] Ch. 747, [1948] 2 All E.R. 492, and *Hunter* v. *A.G.*, [1899] A.C. 309 (H.L.), at 324.

[31] *Oxford Group* v. *I.R.C.*, [1949] 2 All E.R. 537 (C.A.).

[32] See, for example, *supra*, note 28 and accompanying text. In para. (2), *supra*, at 435, the ability of the court to apportion depends on whether the trustees have been given a discretion to expend the whole on a non-charitable purpose.

[33] *Salusbury* v. *Denton* (1857), 3 K. & J. 529, 69 E.R. 1219. See, further, Keeton and Sheridan, *The Modern Law of Charities* (2d ed., 1971), at 38 *et seq*.

(d) PRESERVING THE CHARITABLE ELEMENT UNDER STATUTE

The perils that donors and their draftsmen face in composing gifts for charitable purposes have been apparent for many years, and, since the extension of concessions to charitable gifts is premised upon the value to society of private giving for the public welfare, legislatures in several common law jurisdictions have intervened to assist the making of charitable gifts.[36] As long ago as 1914, the State of Victoria, Australia,[37] introduced salvage legislation, which enabled trustees to devote trust funds for mixed charitable and non-charitable purposes to those purposes that are charitable. In 1935, New Zealand followed suit with identical legislation,[38] and, in 1938, New South Wales also made the same statutory provision.[39]

Then, in 1944, the House of Lords gave judgment in the celebrated, if not notorious, case of *Chichester Diocesan Fund v. Simpson*,[40] known as the "Diplock litigation". It was there held that a testamentary provision whereby the executors and trustees might select such "charitable or benevolent" purposes as they thought fit was totally void, despite a distribution of £250,000 having already been made to 140 charitable institutions throughout the United Kingdom. The enormities of this litigation were impressed upon the Nathan Committee, which between 1950 and 1952 examined this matter among others.[41] In 1954, England, too, passed ameliorating legislation dealing with one aspect of the problem.[42]

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[34] See, for example, *Walsh v. Wallinger* (1830), 2 Russ. & My. 78, 39 E.R. 324. See, also, Pettit, *supra*, note 18, at 168-69.

[35] If the trustee has an obligation or duty to choose, *a fortiori*, the courts would find the trust purposes again too uncertain to execute: see *Chichester Diocesan Fund v. Simpson*, *supra*, note 25, at 356, *per* Lord Wright.

[36] A comprehensive discussion of the legislation and case law is given in Keeton and Sheridan, *supra*, note 33, ch. 16.

[37] *Charitable Trusts Act 1914*, Acts Vict. 1914, No. 2544, s. 2. See, now, *Property Law Act 1958*, Vict. Stat. 1958, No. 6344, s. 131.

[38] *Trustee Amendment Act, 1935*, Stat. N.Z. 1935, No. 37, s. 2.

[39] *Conveyancing Act, 1919*, Pub. Acts N.S.W. 1824-1957, No. 6, s. 37D, as amended.

[40] *Supra*, note 25.

[41] *Report of the Committee on the Law and Practice relating to Charitable Trusts* (Cmd. 8710, 1952) (hereinafter referred to as "Nathan Committee Report"), ch. 12, esp. para. 520.

[42] *Charitable Trusts (Validation) Act, 1954*, 2 & 3 Eliz. 2, c. 58 (U.K.).

However, the Nathan Committee considered that the salvaging of mixed purpose trusts was not an appropriate area for parliamentary intervention. In the Committee's view, the profession had been put on notice by the Diplock, and other, litigation[43] concerning the drafting language that should be avoided. In the view of the Committee, all that could be justified was the rescuing of trusts that existed when these cases were heard, and which had been drawn in the same or similar terms. The 1954 legislation in England, therefore, applies only to those instruments that took effect prior to December 16, 1952. The general purpose, although not the expression, of the Act was the same as other Commonwealth legislation, namely, to permit the application of funds of mixed purpose trusts to the purposes contained therein that are charitable.

Northern Ireland adopted legislation similar in principle to the English Act in 1964,[44] except that the Act applies to trusts whenever taking effect, and requires a scheme to be drawn up for each such trust that is salvaged by the Act. New Zealand revised its provision in 1963 to reflect some of the characteristics of the English Act,[45] but continued to follow the established form of Australian legislation. In 1962,[46] Western Australia incorporated a provision in its *Trustees Act* which bears a trace of the 1954 English terminology, but in all other respects follows closely the Victoria model. Queensland's *Trusts Act 1973*[47] adopted the precise terms of the Victoria provision.

The Diplock litigation and the Nathan Committee Report in England were also the impetus for the examination of this aspect of the law of charity by the Conference of Commissioners on Uniformity of Legislation in Canada.[48] In 1957, the Uniformity Commissioners adopted a model Act provision on the subject.[49] Once again, the concern of this Act was to enable the funds of a mixed purpose trust to be expended solely upon the charitable purpose or purposes, but neither the Australian Acts nor the English Act were precedents for this measure. In 1959, New Brunswick,[50] in 1960, Alberta,[51] and, in 1964, British Columbia[52] adopted the model section. In 1964, Manitoba enacted legislation in substantially similar terms.[53] Manitoba's provision, like the British Columbia provision, applies not merely to testamentary trusts, as does the model Act, but to *inter vivos* trusts as well.

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[43] See *Oxford Group v. I.R.C.*, *supra*, note 31. See, further, *Tudor on Charities*, *supra*, note 9, at 171-74.

[44] *Charities Act (Northern Ireland), 1964*, 12 & 13 Eliz. 2, c. 33, ss. 10-11.

[45] *Charitable Trusts Act 1957*, Repr. Stat. N.Z. 1908-1957, No. 18, as am. by *Charitable Trusts Amendment Act 1963*, Stat. N.Z. 1963, No. 21, s. 4, enacting s. 61B.

[46] *Trustees Act, 1962*, W. Austl. Acts 1962, No. 78, s. 102.

[47] *Trusts Act 1973*, Queensl. Stat. 1973, No. 24, s. 104.

[48] Proceedings of the Thirty-Eighth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1956), at 101. It should be noted that, in 1974, the Conference changed its name to the Uniform Law Conference of Canada.

The Supreme Court of Canada in *Brewer v. McCauley*, [1954] S.C.R. 645, [1955] 1 D.L.R. 415, had followed the English precedents in this area, and decided that a gift for "charitable, religious, educational, or philanthropic purposes" was void.

[49] Adopted as s. 31 of the revised *Uniform Wills Act*, Proceedings of the Thirty-Ninth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1957), at 27. See Consolidation of Uniform Acts of the Uniform Law Conference of Canada (1978), *Uniform Wills Act*, s. 30.

[50] *Wills Act*, S.N.B. 1959, c. 15, s. 30. See, now, *Wills Act*, R.S.N.B. 1973, c. W-9, s. 30.

[51] *The Wills Act, 1960*, S.A. 1960, c. 118, s. 31. See, now, *Wills Act*, R.S.A. 1980, c. W-11, s. 32.

It might seem to those unfamiliar with the law of charity that, since the purpose of such legislation is relatively simple, it should not be difficult to compose suitable provisions to achieve that purpose. The first objective, as we have seen, is to salvage the charitable part of trusts for mixed charitable and non-charitable purposes. The second goal is to exclude from the effects of the legislation those trusts that have already been the subject of judicial decision, or further to which trust property has been distributed on the basis of the invalidity of the trust in question. In fact, it has proved extremely difficult to achieve the first of these objectives, and it is probably not unfair to say that none of the Commonwealth enactments is beyond criticism. The problem is not any ineptness of legislative drafting, but the uncertain limits of the legal meaning of charity, and the varying and subtly different ways in which charitable and non-charitable purposes may be involved in the same gift.[54] We noted earlier six ways in which mixing of charitable and non-charitable purposes may occur, and we were careful to add that this list was not necessarily definitive, as there may well be other ways in which purposes are mixed that our research or ingenuity has not brought to light.

There has also been another problem, and it particularly troubled the Nathan Committee in England, whose conclusions on this matter we shall discuss shortly. Once the legislature embarks upon the course of salvaging trusts, of finding and rescuing the valid from the fate that must overtake the invalid, how far should the law go? Should it confine the salvage operation to the most common occurrences of mixed purposes where invalidity results, that is, for example, where trustees are to select recipients who are engaged in purposes that are "charitable or worthy", or expressed in similar disjunctive phrases? Or, if it is illogical to stop short at this point once salvaging has been adopted as a policy, should the law go so far as to assist the settlor or testator who may have had no charitable intent at all: for instance, "on trust for such purposes as my executors and trustees shall select"? Indeed, it makes a difference whether the reason for intervention is to assist settlors and testators, or to save charitable gifts for society.

The Commonwealth legislative provisions on this subject appear to be of three types: first, the provision contained in the Victoria *Property Law Act*

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[52] *Laws Declaratory Act Amendment Act, 1964*, S.B.C. 1964, c. 27, s. 3. See, now, *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 44.

[53] *An Act to Amend The Trustee Act*, S.M. 1964, c. 56, s. 3. See, now, *The Trustee Act*, R.S.M. 1970, c. T160, s. 91.

[54] There is also the problem of whether the instrument contains a trust at all. For example, X leaves his estate to executors and trustees to distribute his property according to the terms of his will. An outright gift to the ABC Society, an incorporated non-charitable organization, is valid, but, the *Perpetuities Act*, *supra*, note 21, aside, a trust for the purposes of that society will be invalid. Yet a gift to an institution is necessarily a gift for the purposes of that institution: see *In re Lloyd*, [1958] V.R. 523, [1958] A.L.R. 1042 (S.C.). Which is it – an outright gift or a trust?

1958; secondly, the *Charitable Trusts (Validation) Act, 1954*, in England; and thirdly, the provision in the *Uniform Wills Act* in Canada, which has been adopted or followed closely in four provinces. Each of these groups has its own statutory formula for defining the circumstances in which salvaging is permitted, and we now turn to a closer examination of the three categories of provision.

(i) Victoria

The Victoria provision is the oldest, the simplest, and probably the most tried in the courts.[55] Section 131(1) of the *Property Law Act 1958*[56] provides as follows:

> 131.—(1) No trust shall be held to be invalid by reason that some non-charitable and invalid as well as some charitable purpose or purposes is or are or could be deemed to be included in any of the purposes to or for which an application of the trust funds or any part thereof is by such trust directed or allowed.

If a trust comes within this formula, subsection (2) permits the whole trust fund to be expended upon the charitable purpose or purposes. The question is how comprehensive is the first subsection of the various ways in which charitable and non-charitable purposes may be mixed? It will be seen that each of the six ways enumerated previously could be accommodated by this language.[57] It might even be argued that the language of the provision is sufficiently broad to enable a charitable purpose to be extracted from such a term as "for such purposes as my trustees shall select".[58]

In dealing with this language, the Australian courts have in one respect applied it to the letter, and in another they have found a restriction within it. In the first place, the courts have held that it applies to the conjunctive linking of purposes, such as "for the upkeep of the grounds of my house and for the care and maintenance of the parish church of St. George", even though there is an evident intent that the trust fund shall be applied for the attainment of both these purposes. It is true that, in most instances where terms such as

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[55] The Victoria provision has been the model for the legislation in New South Wales, New Zealand, Western Australia and Queensland. For a discussion of the legislation since 1914 in Australia and New Zealand, and the case law on this legislation, see Coghill, "Mixed Charitable and Non-Charitable Gifts" (1940-41), 14 A.L.J. 58; Adams, "Trusts for Charitable and/or Non-Charitable Purposes" (1941-42), 15 A.L.J. 134; Coghill, "Mixed Charitable and Non-Charitable Gifts" (1950-51), 24 A.L.J. 239; and Cullity, "Statutory Salvage of Imperfect Trust Provisions: An Exercise in Comparative Legislation" (1967), 16 I. & C.L.Q. 464. See, also, Coghill and Mitchell, "The Legal Definition of Charity" (1946), 62 L.Q.Rev. 23 and 339.

[56] *Property Law Act 1958*, *supra*, note 37.

[57] The single compendious term has been expressly said to be covered by the Act: see *Leahy v. A.G. for N.S.W.*, *supra*, note 24, at 474. See, also, Meagher and Gummow, *supra*, note 5, at 189-91. A trust for stated purposes, and a gift to an institution whose objects are similar mixed purposes, would both be regarded as covered by the Act: see *In re Lloyd*, *supra*, note 54.

[58] Such a would-be trust object is clearly not charitable under the existing case law: see *Tudor on Charities*, *supra*, note 9, at 143.

"worthy", "benevolent", or "philanthropic" are linked conjunctively with "charitable", the creator of the trust is primarily understood to mean such worthy, benevolent, or philanthropic purposes as are also charitable;[59] but where specific purposes are listed conjunctively that may not be the intention, and the expenditure of the whole fund upon only those purposes that happen to be charitable is arguably an unwarranted salvaging.[60] At common law, the courts might have apportioned, thus leaving the fund that was to be applied to the invalid non-charitable objects to revert to the trust creator or his estate.

On the other hand, the courts have held that the Act does not apply where the trust has a single object that is not exclusively charitable, such as "for the founding of a Catholic newspaper".[61] One would have thought that there is contained in such an object several purposes, namely, the advancement of religion and the provision of the facilities wherewith to operate a newspaper. Yet, if the creator of the trust had worded his gift in this way, the Act would have been held to apply, as we have just seen.[62] The criticism of the "single object" approach is that it may conceal a confusion of means and ends, of stated objects and purposes. This is the ever-present construction issue. Is the donor expressing motives for his gift, or imposing purposes that the recipient is to pursue? If the latter, is the stated object of the transfer the purpose that is to be pursued, or is that statement a means whereby unstated but implied purposes are to be attained?[63]

In some instances, this type of construction can perhaps be explained, however. The courts have made it clear that the Act may not be used to convert an invalid trust into something entirely different and unintended by the creator of the trust.[64] What constitutes an entirely different trust is, of course, a matter of judicial opinion, but it may certainly be argued that a trust for the advancement of Catholicism would seem to most people to be something very different from the founding of a newspaper, albeit that the newspaper is to pursue a Catholic viewpoint. The funds of such an amended, or salvaged, trust might properly be spent to provide surplices and cassocks for altar boys, for instance, which only by a stretch of the imagination is what the creator of the trust intended. Nevertheless, if the courts are too ready to dub the stated object, whether an abstract object or an institution, as *the* object, and find it to be non-charitable and outside the Act, much of the technicality that the legislation is designed to avoid is reintroduced.

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[59] See *Re Shortt* (1974), 2 O.R. (2d) 329, 42 D.L.R. (3d) 673 (H.C.J.). See, also, *Tudor on Charities*, *supra*, note 9, at 145-47. But this need not be the proper construction: see, for example, *Re Hawkins* (1929), 36 O.W.N. 347 (H.C. Div.) ("such charitable and such purposes" as the trustee thinks fit, was held to be void), and *Re Metcalfe*, [1947] 1 D.L.R. 567 (Ont. H.C.J.) ("such religious, charitable and benevolent purposes", as the executors should think fit, was also void).

[60] If a member of the household is sent to the corner store with appropriate funds to buy milk and potatoes, and he returns saying that, there being no potatoes, he spent the entire funds on milk, he might expect to be taken to task.

[61] *Roman Catholic Archbishop of Melbourne v. Lawlor* (1934-35), 51 C.L.R. 1 (Aust. H.C.). See, also, *Re Cahill* (1967), 87 N.S.W. W.N. (Pt. 1) 332 (S.C.); *Re Inman*, [1965] V.R. 238 (S.C.); *Union Trustee Co. of Australia Ltd. v. Church of England Property Trust* (1946), 46 S.R. (N.S.W.) 298; and *Perpetual Trustee Co. Ltd. v. John Fairfax and Sons Pty. Ltd.* (1959), 76 N.S.W. W.N. 226.

[62] *Re Spehr*, [1965] V.R. 770 (S.C.). See, also, *Re Bond*, [1929] V.L.R. 333 (S.C.) ("to the blind and their children" read as "to the blind"), and *Re Thureau* (1948), 2 A.L.R. 487 (Vict. S.C.) ("for such charitable institutions or other public bodies").

[63] There is significant literature on this primary issue. For a discussion, see Watkin, "Charity: The Purpose of Purpose" (1978), 42 Conveyancer (N.S.) 277.

[64] *Supra*, note 61. See, also, Meagher and Gummow, *supra*, note 5, at 188-89.

The courts have also taken the view that there must be some evidence that the settlor or testator had a charitable intention.[65] There must be, as it were, a charitable flavour in the trust purposes. This conclusion means that a trust "for such purposes as my trustees shall select", for example, would not fall within the remedial scope of the Act.[66] One leading Australian text[67] explains the present position of the courts to be that the purposes must be primarily charitable, with some non-charitable elements, and, if that is indeed the position, the Australian courts would appear to have put a significant gloss upon the Act. Such an application of the Act could lead to the type of refined distinctions that the Act was intended to avoid. Perhaps, ideally, this kind of legislation should say how far the legislature intends the salvaging operation to be carried. But that raises the question of how specific the language of the Act can be without introducing its own complexities and unintended restrictions.

(ii) England

Limited effect and obscurity are the charges that the courts in England have levelled against the language of the *Charitable Trusts (Validation) Act, 1954*.[68] This has been said, it is true, of the Act taken as a whole, including the manner in which it applies only to trusts that qualify, namely, those taking effect before December 16, 1952.[69] But the formula of the Act, concerning the trusts it saves, is involved in this criticism, and that formula is expressed in two subsections. Section 1(1) states as follows:

> 1.—(1) In this Act, 'imperfect trust provision' means any provision declaring the objects for which property is to be held or applied, and so describing those objects that, consistently with the terms of the provision, the property can be used exclusively for charitable purposes, but could nevertheless be used for purposes which are not charitable.

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[65] *Leahy v. A.G. for N.S.W.*, *supra*, note 24, at 476, *per* Viscount Simonds, and *Downing v. Commissioner of Taxation of the Commonwealth of Australia* (1971), 125 C.L.R. 185 (Aust. H.C.).

[66] *Re White*, [1963] N.Z.L.R. 788 (S.C.), and *Re Davis*, [1965] W.A.R. 25 (S.C.).

[67] Meagher and Gummow, *supra*, note 5, at 189.

[68] *Supra*, note 42. For a full discussion of the Act, and the case law concerning the application of the legislation, see *Tudor on Charities*, *supra*, note 9, at 171-87.

[69] A clause that would have had the effect of the Australian legislation was rejected by the House of Lords during debate of the measure that was to become the *Charities Act, 1960*, 8 & 9 Eliz. 2, c. 58.

This provision is complemented by section 2(3), which provides as follows:

> 2.—(3) A disposition in settlement or other disposition creating more than one interest in the same property shall be treated for the purposes of this Act as a separate disposition in relation to each of the purposes created.

Unlike the other Commonwealth Acts, this Act is confined to cases where the whole of the trust property could be applied by the trustees to charitable purposes.[70] This otherwise attractive provision has, however, encountered problems. It excludes those cases where the trustees are directed to expend the fund upon a non-charitable purpose. In *Re Gillingham Bus Disaster Fund*,[71] for instance, the fund was to be spent upon certain individuals and only the balance was expendable at the trustees' discretion among mixed charitable and non-charitable purposes. Moreover, it was held that section 2(3) was of no assistance, because the trust did not create "more than one interest in the same property". Clearly, there are considerable difficulties of expression to be surmounted if the legislative formula is to require that, under the terms of the trust, the entire fund can be expended upon the charitable purpose or purposes.

The scope of the definition of an "imperfect trust provision" in section 1(1) of the Act has also given rise to considerable doubt. It has been said that it only permits a severance of the "blue pencil" kind,[72] and, at the other extreme, that it applies even though there is no expression of a charitable intent.[73] Yet other authority suggests that there must be at least some evidence of such intent, some evidence, that is, of a charitable flavour.[74]

There is authority for the proposition that section 1(1) is limited to trusts for mixed purposes, excluding, that is, trusts for institutions that have mixed purposes.[75] Moreover, where in one instance the nexus of common employment was joined with a number of charitable purposes, only one of which was the relief of poverty, the Act was held to apply in such a way that all the other charitable purposes took effect as modes of relieving poverty.[76]

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[70] *Vernon v. I.R.C.*, [1956] 1 W.L.R. 1169 (Ch. D.). In *Stratton v. Simpson* (1970), 125 C.L.R. 138 (Aust. H.C.), it was held that such a construction could not be argued in relation to the Victoria formula, contained on this occasion in the Western Australia *Trustees Act. 1962*, *supra*, note 46, s. 102, where the Victoria formula is introduced as a definition of "imperfect trust provision".

[71] *Re Gillingham Bus Disaster Fund*, [1958] Ch. 300, [1958] 1 All E.R. 37, aff'd [1959] Ch. 62, [1958] 2 All E.R. 749 (C.A.) (unless otherwise indicated, subsequent references are to [1958] Ch.). The fund was to be expended upon the funeral costs of those killed, the care of the disabled persons, "and then to such worthy cause or causes" as the trustees should determine.

[72] *Re Gillingham Bus Disaster Fund*, *ibid.*, at 306, *per* Harman L.J. This was expressly left open on appeal: [1959] Ch. 62 (C.A.), at 75-76. See, also, *In re Harpur's Will Trusts*, [1962] Ch. 78, at 95, [1961] 3 All E.R. 588, at 595, *per* Harman L.J.

[73] *In re Wykes*, [1961] Ch. 229. See, also, *Re Gillingham Bus Disaster Fund*, *supra*, note 71, at 80, *per* Ormerod L.J. ([1959] Ch.).

[74] *Re Saxone Shoe Co., Ltd.'s Trust Deed*, [1962] 1 W.L.R. 943, at 956-57, [1962] 2 All E.R. 904, at 914-15 (Ch.D.). In *Re McCullough*, [1966] N.I. 73, at 75, Lowry J. said of a simpler Northern Ireland version of this Act that it permitted funds to be applied for charitable purposes when in the particular instance there was no charitable flavour. Despite favourable comments on this *obiter dictum* (Sheridan,"Cy-pres in the Cyxties" (1966), 17 N.I.L.Q. 235, at 245-47), the question is whether any trusts for purposes would not be saved. Much importance would also turn on the distinction between trusts for purposes and trusts for persons, where perpetuity or uncertainty of objects would otherwise strike down a trust for persons.

The New Zealand and Western Australia provision also employs and defines the term "imperfect trust provision", but New Zealand adds the English definition as included within the Victoria formula,[77] while Western Australia restricts its definition to the language of the Victoria model.[78]

(iii) Canada

Section 30 of the *Uniform Wills Act* proposed by the Conference of Commissioners on Uniformity of Legislation in Canada provides in part as follows:[79]

> 30.—(1) Where a testator leaves property in trust or by outright gift for a charitable purpose that is linked conjunctively or disjunctively in the will with a non-charitable purpose, and the non-charitable purpose is void for uncertainty or for any other cause, the charitable trust or gift is valid and operates solely for the benefit of the charitable purpose.

Although this language has not been judicially criticized, the section does appear to have several shortcomings. First, it must be regarded as unfortunate drafting that a "purpose" itself, rather than the trust object, is "void for uncertainty". The meaning of the section would also surely have been clearer if, instead of the last line of the subsection, it had stated that "the entire trust property is to be devoted solely to the charitable purpose". As a matter of deeper significance, and parallel with the Western Australia provision, where the conjunctive is employed together with a direction to expend part of the fund on each purpose mentioned, the language of the section 30(1) would require the whole fund to be expended upon the charitable purpose, rather than have that part which is to be expended upon the non-charitable purpose revert to the testator's estate.

However, the most serious limitation is that the subsection applies in those circumstances only where the mixing of purposes occurs as the result of linking by the words, "and" or "or". Fortunately for the testator in *Wood*

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[75] *In re Harper's Will Trusts*, *supra*, note 72, and *Re Mead's Trust Deed*, [1961] 1 W.L.R. 1244, [1961] 2 All E.R. 836 (Ch. D.).

[76] *Re Mead's Trust Deed*, *ibid*.

[77] New Zealand *Charitable Trusts Act 1957*, *supra*, note 45, s. 61B.

[78] Western Australia *Trustees Act, 1962*, *supra*, note 46, s. 102. The Northern Ireland Act, *supra*, note 44, s. 24(1)(a), adopts a formula that is very close in wording to the English Act. The Newark Committee on Charitable Trusts (Cmd. 396, 1959), had recommended a formula that was comparable to the Australian legislation, but this recommendation was not followed. See Sheridan, *supra*, note 74.

[79] *Supra*, note 49. Section 30(2) of the Uniform Act provides for the situation where there are both charitable and non-charitable purposes, and the non-charitable purpose or purposes are valid under the case law, but the will does not provide for the apportionment of the trust property between the charitable and non-charitable purposes.

and Whitebread v. *The Queen*,[80] the sole reported decision on this statutory language, his otherwise invalid gift chanced to employ the conjunctive. If reference is made to the earlier enumeration in this chapter of the various ways in which mixing of charitable and non-charitable purposes can occur,[81] it will be evident that several of those ways would not be included within the language of the *Uniform Wills Act*. Indeed, if the testator merely lists specific purposes or institutions without the employment of a disjunctive or conjunctive, the Act would be thwarted. The principal omission in the section is the single compendious term, but a list of omissions could also include the following: first, the reference to two or more charitable purposes, but for the benefit of persons in a common nexus; secondly, the gift to the official of an institution or to an institution, on trust for his or its purposes; thirdly, the purpose that incorporates both charitable and non-charitable activity; and fourthly, the discretion to distribute among a number of institutions, only some of which are for purposes that are exclusively charitable.

It is true that the disjunctive has been a common cause of the failure of purpose trusts, and that the Diplock litigation arose as a result of this defect, but it is difficult to understand, remedial legislation having been embarked upon, why the occasion was not taken to attempt a solution of the entire problem. For the same reason, the fact that the remedy applies only to testamentary trusts, a limitation adopted by Alberta and New Brunswick but not by Manitoba and British Columbia,[82] is also difficult to understand.

(e) ALTERNATIVES FOR REFORM

The primary issue is whether Ontario needs to legislate in this area. The litigation in England on the subject has apparently declined since the mid-1960's, and the reported cases in Canada are not numerous, although they do constitute a body of law.[83] Perhaps the principal reason for the smaller number of cases in this country than in England and other Commonwealth jurisdictions is the different character of federal tax legislation. Since 1940 in Canada, tax relief for charity has been granted not for charitable gifts, as such, but for charitable institutions and gifts to such institutions.[84] The requirement that institutions seeking charitable status register themselves as charities with Revenue Canada has meant that testamentary and *inter vivos* gifts to charity in Canada have almost invariably taken the form of gifts to registered charities, and the problem of whether an institution is charitable for tax purposes is handled at the registration stage. There can be little doubt that the most significant concession to charity today is relief from the full impact of taxation, and donors are concerned to see that their gifts go to those institutions that qualify for this relief.

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[80] *Wood and Whitebread* v. *The Queen*, [1977] 6 W.W.R. 273 (Alta. S.C., T.D.) ("for the religious, literary and educational purposes of the said Edmonton Lodge of the Theosophical Society in Canada"). In our respectful view, Stevenson L.J.S.C. gives a most comprehensive and instructive judgment in this difficult area of the law of trusts.

[81] *Supra*, this ch., sec. 2(b).

[82] See *supra*, notes 50-53.

[83] Recent authorities include *Re Albery*, [1964] 1 O.R. 342 (H.C.J.) ("any other worthy object or purpose"); *Re Aydt Estate* (1966), 55 W.W.R. 315 (Sask. Q.B.) ("for worthy causes"); and *Re Jacques Estate* (1968), 65 W.W.R. 136 (B.C.S.C.) ("community project"). For a discussion of the Canadian case law, including the provincial statutory law, see Waters, *supra*, note 1, at 505-15.

[84] See, further, Waters, *ibid.*, at 447, *n.* 27, and *supra*, note 13.

However, account should also be taken of the reasons that the Nathan Committee gave in 1952 for not recommending permanent salvage relief for imperfect trust provisions, an opposition that was renewed successfully during the debates in the English House of Lords on the *Charities Act, 1960*.[85] The Committee was concerned that "many unforeseen and unforeseeable consequences may follow the validating by the legislature, in advance, of trusts which would otherwise be void for uncertainty".[86] In saying this, the Committee may have had in mind, as Lowry J.'s words have suggested may be possible with the Northern Ireland legislation,[87] that salvage could reach into trusts that have no charitable flavour, and rescue trusts in an unforeseen manner from the effects of the perpetuity rule and uncertainty of objects. Although it is curious that the Nathan Committee nevertheless recognized the "apparently successful application in practice" of the Australian legislation,[88] it essentially considered that two familiar principles ruled out the adoption of any such legislation.[89] First, every person is presumed to know the law. Charitable gifts already enjoy a considerable concession concerning the degree of certainty required, and there is no justification, thought the Committee, for extending the privileges of charitable instruments to the correction of mistakes. Secondly, it is the responsibility of the testator to say what he means, and his words are taken as a statement of that intention. This is the doctrine of certainty. The only reasonable task to assign to the courts is the determination of what the testator said, not what he intended to say but did not say, and, for their part, testators should be able to be sure in the knowledge that their words will determine their meaning, not what can be read into their words.[90]

There is, we would think, much force in these conclusions. The courts in Australia, where the language of the relevant Acts is simple and direct, have found it necessary to put a "brake" upon the legislation; it is the courts that have decided that the legislation does not permit the validation of something entirely different from the trust intended by the settlor or testator. And it is the courts that have held that there must be at least some evidence of a charitable intent. Indeed, as we noted previously,[91] some interpret the case law to say that the trust must be fundamentally charitable with ancillary non-charitable purposes.

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[85] *Supra*, note 69.

[86] Nathan Committee Report, *supra*, note 41, para. 532.

[87] *Re McCullough*, *supra*, note 74.

[88] Nathan Committee Report, *supra*, note 41, para. 533.

[89] The Report concedes that the Committee was not unanimous in its rejection of the Australian and New Zealand precedent of remedial legislation: see Nathan Committee Report, *supra*, note 41, para. 534.

[90] *Ibid.*, paras. 534 and 535.

[91] *Supra*, note 67 and accompanying text.

Whether or not we agree with this last interpretation is irrelevant. The point is that, if the legislation does not clearly delineate those trusts that may be salvaged from those that may not, then the courts must assume that role. Either the legislature or the courts must draw the lines of distinction. Legislative attempts, as we have seen, have been vulnerable to criticism, because they tend to import the very type of technical problems that it was the purpose of the legislation to avoid. Moreover, there is the problem that, if the line drawing is done by the legislature, complexity and obscurity may be the outcome. Yet, if the matter is left to the courts, there will be uncertainty concerning what line the courts are drawing, given the individuality of gifts for the public benefit and the variety of linguistic expressions that must be construed.

On the other hand, neither the present mode of conferring tax relief nor the difficulties of drafting appropriate legislation should prevent a legislative remedy from being provided, if there is a demonstrated problem and a remedy that legislation can provide. There is such a problem, and, as the Nathan Committee conceded, the Australian model of legislation has had an "apparently successful application in practice".[92]

So far as the tax relief argument is concerned, it would be possible in any future year for the federal legislation to provide that, where executors or trustees are given a discretion as to the distribution of trust funds, whether it is a discretion to decide which institutions and how much for each institution selected, or to decide how much each specified institution is to have, that discretion must be exercised within a stated period of the instrument of gift taking effect. Executors and trustees are, at present, given a period of time within which to allocate assets of the deceased's estate to the surviving spouse or the spousal trust, for the purpose of that particular form of tax relief, and we understand that it is, in fact, the practice of the federal authorities to confer upon trustees a period of time during which they may exercise a discretion in the selection of charities. Were the practice of giving discretion to executors to become more familiar, the revised *Trustee Act* ought to be in a position to prevent a reoccurrence of the Diplock litigation[93] or the result in *In re Cox*.[94] At a time when a revision of the *Trustee Act* is being proposed, the occasion should be utilized to introduce the required remedial provision.

The conclusion of the Nathan Committee, for its part, is curiously defeatist. There ought to be a remedy if only because the state seeks to encourage philanthropy, and the traps awaiting the would-be charitable donor are several and subtle. But, over and above these considerations, the arguments of the Committee are, to our mind, unconvincing. To fear the unforeseen and the unforeseeable, while conceding the success of the Australian provisions in practice, is a strangely unfinished position for the Committee to take in its final Report. And, as for the argument that every person is presumed to know the law, surely the subtleties of the legal definition of charity are such that legislative salvaging is justified. An unadvised lay testator is most unlikely to appreciate the legal gulf that separates "charitable" and "worthy", for instance. The final argument, namely, that the court is asked by such legislation to determine what the creator of the trust intended to say, but did not say, appears to mis-state what can be observed in the decisions of the Australian and New Zealand courts. The courts are not required by that legislation to speculate on the intention of the creator of the trust; once the words of the instrument have been construed, and the intention discovered, it is purely an objective matter of whether the charitable can be isolated from the non-charitable.

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[92] Nathan Committee Report, *supra*, note 41, para. 533.

[93] *Chichester Diocesan Fund* v. *Simpson*, *supra*, note 25, and text accompanying note 40, *supra*.

[94] *Supra*, note 26.

(f) CONCLUSIONS

In weighing these two positions, we have concluded that Ontario should adopt remedial legislation. We find ourselves in agreement with the Canadian Uniformity Commissioners that there is a real shortcoming in the law if a Diplock litigation or an *In re Cox* can occur, and thus frustrate entirely a charitable motive that society otherwise goes out of its way to encourage.[95]

We are also of the view that, if the problem is to be addressed, a solution must be sought that meets the scope of the problem, rather than one manifestation of it. Therefore, we cannot support the adoption by Ontario of the provision contained in the *Uniform Wills Act* as agreed upon by the Uniformity Commissioners. We have also discarded the English legislation of 1954 as a model; not only has it proved obscure in meaning, but it is too restrictive as to the trusts to which it applies, and as the years pass litigation to determine its applicability will become progressively less. It is to the Victoria model that we have finally turned.[96] As we have noted previously, it is short and simple in character, a feature that we think eminently desirable, and since 1914 a significant body of case law has been accumulated concerning its applicability. We agree with the Nathan Committee that, in practice, this legislation has been successful, and we think that in this of all areas of law a body of established procedure will be of value in Ontario. We have decided that the form of that legislation as it appears in the Western Australia *Trustees Act, 1962*[97] approximates most closely what we think is necessary. In addition, we have had the opportunity to benefit from the case law and, accordingly, to suggest some modifications.

A factor that any remedial legislation in Ontario must accommodate is section 16 of the *Perpetuities Act*,[98] a provision that the Province enacted in 1966, and which is a unique consideration in drafting mixed purpose legislation. As we noted previously, section 16(1) states that a trust for a specific non-charitable purpose is to take effect as a power to appoint, which the trustees may exercise for up to twenty-one years. At the close of the trust, or at the latest after twenty-one years, the trust property that remains dedicated to that purpose and is unexpended reverts to the settlor or testator. This means that the property passes to the person or persons who would have taken it if the trust had been invalid from the beginning. As yet, there has been only one reported decision on the applicability of this section, but that case, a decision on the equivalent section in the Alberta *Perpetuities Act*, contributes significantly to the issue of what "specific" means. The Court concluded that "specific" means certain, in the way that trust objects must be certain.[99] The effect of this section, then, is that, in Ontario, the validity of trusts for non-charitable purposes is not restricted to the list of anomalies recognized by the case law, but extends to any purpose that can be described as "specific" or certain.

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[95] *Supra*, note 48, at 120-26.

[96] *Supra*, note 37, and *supra*, this ch., sec. 2(d)(i).

[97] *Supra*, note 46.

[98] *Supra*, note 21.

The Commission is of the view that, generally speaking, where a trust for purposes, either *inter vivos* or testamentary, and however worded, authorizes the trustees to apply the trust property for non-charitable, as well as for charitable, purposes, even if the trustees could apply the whole for the non-charitable purposes, the trust should not be invalid and lead to the reversion of the property to the settlor or testator, as would be the situation if the case law applied. Instead, the trustees should be able to apply the property to the charitable purposes only, as if the trust terms had been drawn in that manner.

Accordingly, we recommend that a trust for both non-charitable and charitable purposes should not be held to be invalid for the reason only that it is an imperfect trust provision.[100] We further recommend that every imperfect trust provision should be construed and given effect to as if no application of the trust property or any part thereof to or for any non-charitable purpose had been or could be construed to have been authorized.[101] For the purpose of these recommendations, "imperfect trust provision" should mean a trust under which a non-charitable as well as a charitable purpose is included or could be construed as being included in the object or objects of the trust to or for which an application of the trust property or any part thereof is directed or allowed by the trust.[102]

To this general provision we would add two qualifications. The first is that, where a non-charitable purpose is specific within the meaning of section 16 of the *Perpetuities Act*, or comes within the case law list of permitted non-charitable purposes,[103] so that the trust is valid for up to twenty-one years, the property dedicated to mixed purposes should be employed for the non-charitable purpose for the permitted period of time. However, we are of the view that any property remaining after the non-charitable purpose is achieved, or after twenty-one years have expired, should not revert to the settlor or testator's estate, but should be expendable by the trustees upon the charitable purposes.

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[99] *Wood and Whitebread v. The Queen*, *supra*, note 80, at 281. Stevenson L.J.S.C. was "also mindful" that "specific" means precise or definite. The Act in question was the *Perpetuities Act*, S.A. 1972, c. 121, s. 20(1), which is almost identical to s. 16 of the Ontario Act.

[100] Draft Bill, s. 81(2).

[101] *Ibid.*, s. 81(3).

[102] *Ibid.*, s. 81(1).

[103] Those purpose trusts allowable at common law are surely all "specific" within the meaning of s. 16(1) of the *Perpetuities Act* – they would certainly satisfy the test in *Wood and Whitebread v. The Queen*, *supra*, note 80 – so that the distinction between non-charitable purpose trusts valid under the common law or by statute need no longer be made in Ontario.

In the latter respect, we depart from section 16(2) of the *Perpetuities Act*, which was designed to deal with the trust that was for non-charitable purposes exclusively. In such a case, after the expiration of the permitted duration of the non-charitable purpose under section 16(1), reversion of the remainder of the fund to the settlor or testator is justified. Where, however, the trust is for mixed charitable and non-charitable purposes, the latter being valid for a period of time under section 16(1) of the *Perpetuities Act*, we are of the view that, subject to one exception, which we shall discuss next, the charitable purpose should receive the benefit of any remainder of the fund after the expiration of the non-charitable purpose; under our general proposal, the charitable purpose would have received the benefit of the entire fund had the non-charitable purpose been void *ab initio*. Accordingly, we recommend that, where under an imperfect trust provision property is held on trust that is valid by virtue of section 16(1) of the *Perpetuities Act*, the non-charitable purpose so validated should be permitted for the time period provided by that Act; however, at the end of the permitted period, section 16(2) of the *Perpetuities Act* should not apply, and any remaining property should be dedicated exclusively to the charitable purposes set forth in the trust instrument.[104]

The second qualification is that, where the settlor or testator provides that some part of the trust property, whether or not the amount is specified, *must* be applied to non-charitable purposes, the recommended statutory salvaging power should apply only to property that is to be employed for the carrying out of the charitable purpose or purposes. The creator of the trust has made it clear that he does not wish to leave to the discretion of his trustees the matter of whether trust property shall be applied to the non-charitable purposes. If he has left it to their discretion, we think that the creator of the trust can be assumed to prefer that the whole trust property shall be expended upon the charitable purposes, or, if the non-charitable purpose is specific, on that purpose for the permitted period under the *Perpetuities Act*, with any remaining funds reverting at the end of the period to the charitable purposes. But that, in our view, is the limit to which his preference should be assumed.

Moreover, where the creator of the trust has expressly or impliedly directed that the trustees apportion the trust property between the charitable and the non-charitable purposes, we do not think the proposed legislation should apply to that portion of the trust property that is directed to be expended upon the non-charitable purposes. In relation to that property, the present law should remain in place. That is, either the property in question reverts at once to the settlor or testator, or section 16 of the *Perpetuities Act* applies and reversion to the creator of the trust takes place at the close of the trust, or at the latest after twenty-one years. It would make for simple legislation if this apportionment direction could be ignored, but, as we say, we do not think an expression of intention that there be an apportionment should be ignored.[105] Even if the non-charitable purpose is not specific and therefore cannot be pursued at all, we are of the view that the creator of the trust is entitled to have the property specifically directed to be dedicated to that purpose revert to him. Accordingly, we recommend that, where under the terms of an imperfect trust provision the trustees are expressly or impliedly directed to apply a part of the trust property to or for any non-charitable purpose, none of our recommendations relating to the application of funds of imperfect trust provisions to charitable purposes should apply, and the existing law should govern.[106]

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[104] Draft Bill, s. 81(4).

We should also say something of how we propose to deal with the requirement of the Australian courts that there must be some evidence of a charitable intent on the part of the creator of the trust before an imperfect trust provision will be salvaged. We prefer to remain silent on this matter. We have concluded that this is something best left to the courts, in part because the Australian precedents provide a useful and flexible guide to the Ontario courts, but mainly because any statutory language that we can conceive threatens to introduce the very complexity and obscurity that we are attempting to avoid.[107]

On the other hand, we have sought to define the term "imperfect trust provision",[108] which attempts to distinguish purposes and objects. Every trust must have an object or objects, and that object or those objects may take the form of purposes (as opposed to persons). An object, as described by the trust instrument, may involve one or more purposes. Whether it does so in any particular case is a question of construction, but in distinguishing objects and purposes in the revised Act we have tried to prevent the "single object" approach from being raised.[109] Sometimes the creator of the trust may indeed have only one purpose in mind, but at other times the description of a single trust object conceals two or more purposes. If the purposes had been listed by the instrument, the Victoria legislation would apply; if a single object is given, it may be misinterpreted as a single purpose, and the Act would not apply.[110] We have made an effort to prevent the confusion of means and ends.

As to the applicability of the proposed provisions in the revised Act to trusts for mixed purposes that are already in existence when the legislation takes effect, there are two possible courses of action. Both are to be found in effect in other Commonwealth legislation. One course is to make the legislation applicable only to trusts coming into effect after the legislation comes into force. The other course is to make it applicable to all mixed purpose trusts, whenever they take effect, but to provide that the legislation shall not disturb any judicial judgment or order concerning such a trust, or disentitle any person to any property that he has received on the basis of the invalidity of a mixed purpose trust.

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[105] It will be recalled that the courts have resolved the ambiguity of the Victoria provision by deciding that, where purposes are limited by the word, "and", and the construction of meaning is that some property is to be allocated to each of the purposes, the Act applies and the whole property may be applied to the charitable purposes. The New Zealand legislation itself clearly implies that this may be done. We are departing from that policy. See *supra*, note 60 and accompanying text.

[106] Draft Bill, s. 81(5).

[107] We have observed that, in *Wood and Whitebread v. The Queen*, *supra*, note 80, at 284, Stevenson L.J.S.C. appears to have assumed that some charitable intent must be shown.

[108] Draft Bill, s. 81(1). See *supra*, note 102 and accompanying text.

[109] See *supra*, note 61 and accompanying text.

[110] See *supra*, notes 61-63.

We have concluded that the second course of action is preferable. Even if, for instance, there is a testamentary trust giving a remainder absolute in trust for mixed purposes, and the life tenant is still alive when the proposed legislation takes effect, we do not see why that legislation should not apply to the limit. After all, we are discussing a statutory salvage jurisdiction, and we are of the view that the legislation should be available wherever it can be of assistance. Accordingly, we recommend that the above recommendations should apply to any imperfect trust provision, except an imperfect trust provision that, before the revised Act comes into force, was declared to be invalid by a court of competent jurisdiction, or pursuant to which property, or income arising from property, was paid or conveyed to, or applied for the benefit of, one or more persons who would have been entitled by reason of the invalidity of the imperfect trust provision.[111]

Finally, we wish to note two matters that involve the interpretation of the *Perpetuities Act*. As discussed previously, section 16(1) of the *Perpetuities Act* provides that trusts for specific non-charitable purposes shall take effect as powers of appointment vested in the trustees, and pursuant to the Act shall last no longer than twenty-one years.[112] It is not clear, however, whether section 16(1) of the *Perpetuities Act* is for the purposes of that Act only – that is, for the purpose of enforcing specific non-charitable trusts for a maximum period of twenty-one years – or whether it means that in all cases a specific non-charitable purpose is to be construed as a power and, therefore, as valid. In *Wood and Whitebread v. The Queen*,[113] Stevenson L.J.S.C. was of the opinion that the counterpart of section 16(1) in the Alberta *Perpetuities Act*[114] was of general application and not limited to matters involving perpetuities.[115] We agree with this position and, accordingly, recommend that the revised Act should provide that a trust that is solely for one or more specific non-charitable purposes takes effect as a power for all purposes, except with regard to any purpose that is illegal or contrary to public policy.[116]

The second matter involves the meaning of the term "specific" in section 16(1) of the *Perpetuities Act*. As noted previously, the Act does not define the word "specific", although it is clear that the Act applies to all non-charitable purposes that qualify as "specific", and not merely to those purposes that are recognized as valid by the existing case law.[117] We also observed that, to date, only one reported decision has dealt with the meaning of the term "specific" in this context.[118] Stevenson L.J.S.C. concluded in *Wood and Whitebread v. The Queen*[119] that "specific" in section 20(1) of the Alberta *Perpetuities Act* means certain, in the way that trust objects must be certain.[120] We are of the view that, for greater certainty, it would be useful to define the term "specific" for the purposes of the *Perpetuities Act* and the provision of the revised *Trustee Act* that deals with specific non-charitable purpose trusts. Accordingly, we recommend that the revised Act should provide that a specific purpose under section 16 of the *Perpetuities Act* and under the revised Act means a purpose which, on a proper construction, is certain as the object of a power.[121]

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[111] Draft Bill, s. 81(6).

[112] See *supra*, note 21 and accompanying text.

[113] *Supra*, note 80.

[114] R.S.A. 1980, c. P-4, s. 20(1).

[115] *Supra*, note 80, at 280.

[116] Draft Bill, s. 82(1).

3. REORGANIZATION AND VARIATION OF CHARITABLE TRUSTS

(a) INTRODUCTION

Charitable trusts, like charitable corporations, may endure for many years. Indeed, charitable trusts are exempt from the common law rule against perpetual duration for the reason that the property in question has been devoted by way of the trust to the public benefit.[122] The property no longer is private, even though it is to be administered by the private sector. It is to be expected then that over the years changes in the manner of administration of such trusts may become necessary, or at least desirable, and also that the purposes, or objects, of the trust may become outdated. The reasons for which administrative changes may become necessary, or objects outdated, are obviously many, and depend upon the factual circumstances of each trust, but instances can be given by way of example.

We take first administration. The trustees may wish to amalgamate their trust with another that has the same or similar purposes; in this way, through greater investment possibilities, access to a more skilled support staff, or combined facilities, more can be achieved than by each trust "going it alone". Alternatively, the trustees may have decided that greater efficiency would result from incorporation of the trust purposes as a non-profit corporation,[123] and the consequent transfer of the trust property to this new corporation.

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[117] See *supra*, note 22 and accompanying text.

[118] See *supra*, note 99 and accompanying text.

[119] *Supra*, note 80.

[120] *Ibid.*, at 281.

[121] Draft Bill, s. 82(2).

[122] See Waters, *supra*, note 1, at 443 *et seq.*

[123] See *Corporations Act*, R.S.O. 1980, c. 95, Part III, ss. 117-33. For the range of activities that may be incorporated as corporations without share capital, see s. 118 of the Act.

So far as objects are concerned, the original objects of the trust may have been carried out to the extent that this can be done. Flood or fire victims, for instance, may have received all the assistance that can usefully be given by a trust whose object was to give relief. A contemplated community centre may have been built. Alternatively, through a change in the circumstances in the locality in which the charitable trust operates, there may no longer be a need for the provision or support of the school or place of worship the creator of the trust had in mind and adopted as the trust object. The school or church may have been closed, or, on the other hand, so scaled down in size of operation that there are available funds in the trust that could more usefully be spent on other things for the public's benefit. In such instances, a move of population from the farm to the city, or in pursuit of employment opportunities, may be the explanation for the position in which the trustees find themselves. But, today, zoning and subdivision laws may have the same effect, causing areas to change in character.

And this suggests another way in which the objects of charitable trusts, like those of charitable corporations, can be overtaken by the acts of government. Unemployment insurance and social security assistance in all parts of Canada have now substantially diminished the kind of want for which older trusts for the relief of poverty were often expressly designed. There is still, of course, need, and those with low incomes especially will experience those needs, but the help that is required today may differ from the kind of relief that the trustees are authorized by the trust instrument to provide. Indeed, governments at all levels see their role as being the improvement of the quality of life through the programmes they introduce, and it may well be that the needs that charitable bodies can most usefully meet are themselves gradually changing from decade to decade.

The necessity to reorganize administrative aspects of a charitable trust or to vary its objects to ensure viability in contemporary society creates difficulties, however. As the following discussion will reveal, the problem arises from the apparent inadequacy of the jurisdiction possessed by Ontario courts to authorize trustees to act administratively in ways that are not permitted by the trust instrument, and to expend the trust property upon purposes, or objects, that are different from those permitted by the trust instrument.

(b) PRESENT LAW

(i) Common Law

Since the medieval period, the courts have fostered charity by encouraging gifts to charity and by upholding charitable trusts. As we have seen, charitable trusts are permitted to endure for any period of time, and a gift over to another charity following a gift to an initial charity may vest at a time beyond the end of the perpetuity period.[124] In both cases, the explanation is that the courts regard the property in question to have been dedicated for all time to the exclusive benefit of the public.

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[124] See Morris and Leach, *supra*, note 9, at 188-89.

A charitable trust may satisfy the basic test, applied to all trusts, that the trust objects must be certain, in the sense that the court knows who is to be benefited or, in the case of the few valid non-charitable purpose trusts, what specific purpose the creator of the trust had in mind. Nevertheless, in the case of charitable objects, again as we have seen, the courts have been willing to accept a charitable trust object as certain if it can be said that at least the stated purpose or purposes, however inexplicit, are exclusively charitable in character. The charitable purpose is thus upheld. But the preservation of the inexplicit, albeit charitable, purpose gives rise to difficulty. How is the trustee to know exactly what he is to do within the legal sphere of charity? If the trust instrument gives him a complete discretion to select and support to any degree those charitable purposes that he chooses, there is no difficulty. The testator or settlor has provided a mechanism whereby the inexplicit can become explicit. But if the trustee has merely a limited discretion, or no discretion at all, he requires assistance.

From the earliest times, the courts, at first the ecclesiastical courts and later the Court of Chancery, gave this help.[125] The courts in their administrative capacity would construe the intention of the testator or settlor, and then design a scheme whereby specific charitable objects would be supplied, which would carry that intent into effect. The courts did this, and continue to do so, under their inherent jurisdiction over all trusts. Pursuant to their inherent jurisdiction, which, in this context is known as the scheme-making power,[126] the courts will supply the missing or effective administrative detail where the donor's directions are indefinite, ambiguous, or insufficient concerning either the specific objects he intends or the mechanics for determining his intended objects, or the intended manner in which his objects are to be attained. In short, the courts will enable the trustees to carry out their task where, without the court's help, that could not otherwise be accomplished because of missing or ambiguous directions in the trust instrument.

One of the most familiar exercises of the court's inherent scheme-making jurisdiction concerns the administrative aspects of a charitable trust, and occurs where the testator or settlor has named a charitable institution but has incorrectly given the name,[127] or where the named institution has undergone changes of its own after the instrument of gift was executed and before it took effect.[128] In the case of the incorrect naming, the court will conduct an inquiry to determine which institution the donor intended to benefit. Where the institution has changed its name, or undergone a merger with another institution, the judicial inquiry will determine whether the donor's named institution can still be identified in its changed form. Identifying the intended beneficiary is a task the court often has to undertake in the construction of wills, whether or not the beneficiary is a charitable cause or an institution, and there is no doubt that the identifying of intended charitable institutions is closely related to this task. The inherent jurisdiction of the court to deal with defective administrative details of a charitable trust, such as the identification problem, and to provide a broad range of remedial measures[129] must be distinguished from a second aspect of the court's inherent scheme-making jurisdiction, namely, the exercise of the *cy-près* jurisdiction.[130]

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[125] For an account of the historic role of the courts, see Jones, *History of the Law of Charity, 1532-1827* (1969).

[126] See, further, Waters, *supra*, note 1, at 515-22.

[127] *Re Clapper* (1910), 2 O.W.N. 111 (H.C.J.), and *Re Hogle*, [1939] O.R. 425 (H.C.J.).

[128] See, for example, *Re Stewart* (1958), 13 D.L.R. (2d) 654 (B.C.S.C.), at 657, and *Re Ogilvy and Ogilvy*, [1952] O.W.N. 625, [1953] 1 D.L.R. 44 (H.C.J.).

The so-called *cy-près* jurisdiction authorizes the judicial making of a scheme that varies the object or objects stipulated by the testator or settlor in the trust instrument.[131] The donor's intentions are clear enough, but, when the instrument of gift takes effect, either his stated object is impossible or impracticable, or, at a later stage, after his resources have been applied to the charitable purpose, further or continued application of the funds for that purpose becomes impossible or impracticable. The first situation is known in law as initial impossibility or impracticability, and the second circumstance as supervening impossibility or impracticability.[132]

However, in addition to the presence of the requisite impossibility or impracticability, there is an added requirement where the problem is one of initial impossibility or impracticability. In order for the court to exercise the *cy-près* power in this instance, the testator or settlor must have had a general charitable intent. It must be evident that the donor intended to do more than benefit the particular charitable purpose he has described; in other words, the particular charitable purpose must have been intended as a mere means towards the end of dedicating his property to charitable work at large of that kind – for example, the advancement of education generally, where he named a specific educational institution in the instrument – or to charity of any kind. The explanation for this requirement of a general charitable intent is sensible enough. Before the court will apply the donated property to a purpose other than that which the donor has named, it must be convinced that the donor did, indeed, intend a gift to charity at large. A reversion of the property to the settlor or the testator's estate will be ordered if he had only the stated object, albeit a charitable object, in mind, and that object cannot be implemented.[133]

"*Cy-près*" is Norman French for "as near as possible". Accordingly, provided that the requirements of an initial impossibility or impracticability, together with a general charitable intent, are shown, or a supervening impossibility or impracticability can be established, the court will draw up a scheme applying the trust property to purposes that can be carried out and that are as near as possible to those intended by the creator of the trust.[134]

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[129] See Waters, *supra*, note 1, at 515-18.

[130] As Waters points out, "a scheme is not necessarily, or even generally, a scheme for the application of property cy-près". Citing *Re Robinson*, [1931] 2 Ch. 122, at 128-29, for this proposition, Waters notes that "[i]n Canadian decisions this fact seems often to be overlooked. The courts appear often to take the view that all schemes are cy-près." Waters cites *Re Roberts* (1958), 26 W.W.R. 196 (Alta. S.C., App. Div.), as an example of this latter statement, which case, in his view, involved a non-*cy-près* scheme: see Waters, *supra*, note 1, at 516.

[131] For a comprehensive description of the *cy-près* doctrine, see Keeton and Sheridan, *supra*, note 33, ch. XIV.

[132] See Waters, *supra*, note 1, at 522-34.

[133] Ontario courts have sometimes required a general charitable intent even though the impossibility or impracticability is only supervening: see *Re Fitzgibbon* (1922), 51 O.L.R. 500, 69 D.L.R. 524 (H.C. Div.); *Re Harding* (1904), 4 O.W.R. 316 (H.C.J.); and *Re Wright*, [1938] O.W.N. 136 (C.A.). For critical comment, see Waters, *supra*, note 1, at 531. Kelly J., in *Re McDougall*, [1939] O.W.N. 64 (H.C.J.), did not accept the views of the earlier courts on this matter.

"Impossibility" and "impracticability", as terms of art, have never been defined by the courts. Possibly this is because the courts have not been willing to risk circumscribing their jurisdiction in an area where the fact situations that can come before the courts are infinitely various. But, whatever the explanation, and although the terms are judicially created, common law courts can be observed to have taken a restricted view of what can be done. Impossibility occurs where the trust object cannot be carried out, as, for instance, where a named institution ceased to exist in the testator's lifetime,[135] or where it cannot be discovered which existing institution of several the testator intended when he stated a name that is evidently incorrect.[136] This aspect of the jurisdiction is confined to situations where the carrying out of the stated object is literally impossible. In many instances, the application of the donor's funds for the object intended is possible, but demonstrably those funds could be employed more effectively for another object, something that is not unrelated, but that represents contemporary need. The contemporary object may embrace the donor's stated object, or represent an "up-dating" of the charitable endeavour that he was anxious to support.

It might be thought that the courts would achieve this modernization process, as well as the adaptation of any charitable trust object to prevailing circumstances, through the alternative criterion of impracticability, but such has not proved to be the case. Impracticability has been seen as something akin to impossibility: although the trust creator's object can be carried out, the circumstances in which he conceived of his gift must have totally changed. He may have provided funds for the building of a church, and on his death the community he had intended to benefit has acquired a totally adequate church,[137] or he may have bequeathed funds for the erection of a senior citizens' residence, but on his death the funds, sufficient when the instrument was executed, are now obviously insufficient.[138] Impracticability, in other words, does not extend to the situation where, although the donor's funds can still be applied to his chosen object, it now makes better sense to apply those funds to a different, yet related, object.

Aside from impossibility or impracticability, *cy-près* application of the trust property is also possible where the funds or income of an established trust become surplus to its needs. This situation arises most particularly in the case of public appeals.[139]

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[134] If a charitable corporation is wound up, its undisposed of property at the date of dissolution will be forfeited to the Crown (*Corporations Act*, R.S.O. 1980, c. 95, s. 322), and the Crown traditionally has allowed *cy-près* application of such property: see *In re Slevin*, [1891] 2 Ch. 236 (C.A.). See, also, Waters, *supra*, note 1, at 522.

[135] See *Re Ogilvy and Ogilvy*, *supra*, note 128.

[136] See *Re Johnston*, [1968] 1 O.R. 483, 66 D.L.R. (2d) 688 (H.C.J.).

[137] See *Re Schneckenburger* (1931), 40 O.W.N. 210 (H.C.J.).

[138] See *Re McFee* (1929), 37 O.W.N. 266 (H.C. Div.).

For instance, from time to time in every society accidents and natural disasters occur which cause loss of life or property damage. In circumstances of this kind, an appeal may be made to the public to contribute funds for the relief of the victims of the accident or disaster in question. Alternatively, an appeal may be launched for funds so that a particular project can be carried out, such as the provision of a community facility. The funds contributed in such instances are held by trustees, and the trustees expend the funds upon the proclaimed purposes. Such funds may be assembled in a number of ways. Gifts may be made directly to the trustees, either under the name of the particular donor or anonymously, but funds may also be assembled by voluntary agents who, in a variety of ways, have collected moneys, in each case small in amount, from a large number of donors.

Additionally, events such as entertainments may be held, or articles voluntarily given are sold by organizers, and, in each instance, the proceeds are donated to the appeal trustees. The important point for present purposes is that the great majority of donors are later unidentifiable. Therefore, should a surplus of funds remain after the purposes of the trust have been carried out, or, more rarely, should none of the fund be needed because, for instance, governmentally supplied funds or the proceeds of insurance policies have become available, or the project in question cannot be carried out, the question arises whether an application can be made to the court for a *cy-près* scheme.

Under the case law, it is not clear whether a general charitable intent needs to be established. The authorities are divided, but it is arguable that such an intent on behalf of each donor is necessary, not only where there is an initial impossibility or impracticability, that is, where none of the assembled funds can be spent, but also where there is a supervening impossibility or impracticability, that is, where a surplus remains.[140] It is not difficult to appreciate that, where such an intent must be shown before a scheme may be made, insuperable problems may arise in the case of public appeals. If a court is of the view that the objects of a particular public appeal are specific in nature, the inference is that donors may well have had only a specific charitable intent, or to put it another way, intended their moneys to be returned if the assembled funds could not be used for the stated objects of the appeal. Another court might take the view that, although the object of the trust was particular, anonymous donors must be taken to have intended to part with their money absolutely, and, therefore, to have had a general charitable intent. In the latter event, a *cy-près* scheme may be made, but in the former a stalemate will result. Moneys cannot be returned to persons who cannot establish that they were donors, which will be the case where there was anonymity in giving.

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[139] See, further, Waters, *supra*, note 1, at 531-34, and Cracknell, *Law Relating to Charities* (1973), at 138-41.

[140] Two English authorities apparently decided that such an intent is necessary before a *cy-près* application can be granted in the case of surplus funds: see *In re Welsh Hospital (Netley) Fund*, [1921] 1 Ch. 655, and *In re North Devon and West Somerset Relief Funds Trusts*, [1953] 1 W.L.R. 1260, [1953] 2 All E.R. 1032 (Ch. D.). But this is a distinctly minority view: see, further, Hanbury and Maudsley, *Modern Equity* (11th ed., 1981), at 512, and Cracknell, *supra*, note 139, at 140.

While Canadian courts have sometimes been less strict in the application of the *cy-près* power than the courts in England, to a certain extent the courts feel bound by the intention of the donor. On occasion, the courts have varied the original object to a degree that would surely have shocked the donor,[141] but, in the main, courts have attempted to name objects that literally are as near as possible to the letter of the donor's stated object. That intention has been more than a lodestar to the courts; it has been the pilot steering the courts to the variations to which they have come.

Two features of the judicial scheme-making power have therefore become evident. First, the limits of the power, whether in its general nature or its *cy-près* form, being judge-made, inevitably lack a definite character. In other words, it is difficult to be precise whether the courts have, or will assume, a jurisdiction in particular circumstances that are in any way borderline.[142] Secondly, the scope of charitable objects is so wide, and the different character of those objects such, that the individuality of each application to the courts is an inevitable outcome. And judicial minds can honestly differ about whether the court's jurisdiction can be exercised, or ought to be exercised, in differing circumstances.

(ii) Statutory Reform

a. England

One of the principal reasons for the appointment of the committee under Lord Nathan in 1950[143] in England was the widely felt concern for the number of charitable trusts whose objects were capable of variation only so far as the existing judicial scheme-making power permitted. The *cy-près* power was seen as too limited.[144] Many trusts existed that were not covered by the wider statutory scheme-making powers conferred upon the courts, the Charity Commissioners, and the Ministry of Education and Science by the nineteenth-century Charitable Trusts Acts, 1853-1860[145] and the Endowed Schools Acts.[146]

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[141] See, for example, *Da Costa v. De Pas* (1754), Amb. 228, 27 E.R. 150. The testator, who was Jewish, left money for the instruction of persons in the Jewish faith. At the time in England, this was an unlawful purpose, and the funds were applied for the support of a hospital for foundling children, and their instruction in Christianity.

[142] In one English case, *In re Dominion Students' Hall Trust*, [1947] Ch. 183, the Court approved a *cy-près* scheme that omitted a term in the instrument of gift that imported a colour bar. How far is such a term "impracticable" as opposed to being undesirable? Human rights legislation would today render such a term illegal, and thus make that trust term "impossible".

[143] Nathan Committee Report, *supra*, note 41.

[144] *Ibid.*, para. 110.

[145] Prior to the English *Charitable Trusts Act, 1853*, 16 & 17 Vict., c. 137, the power to make schemes for the administration of charitable trusts was still vested exclusively in the Court of Chancery. Since that time, the courts and various administrative agencies in their respective areas of operation have exercised the power concurrently. In Canadian jurisdictions, the power is still exclusive to the courts.

[146] See Waters, *supra*, note 1, at 515.

The latter Acts were particularly notable because they permitted schemes to be made and put into effect before the educational trust objects in question were impracticable of execution in the common law sense. But these trusts were significantly less in number than those other charitable trusts – some 80,000 – that were still capable of variation by the common law *cy-près* power alone. The Nathan Committee concluded[147] that "with the extension of public social services, and with changes in standards and ways of life and with shifts of population to relatively under-endowed areas, the need for relaxation of the strictness of the [*cy-près*] doctrine in favour of all charitable trusts is now urgent".

The Nathan Committee also made recommendations concerning what should be done. In its view, the wide scheme-making powers conferred upon the Secretary of State under the Educational Endowments (Scotland) Acts, 1882-1946,[148] were superior to any powers conferred upon English authorities for English charities, and the Committee adopted the Scottish powers as the basis of its recommendations. Broadly stated, the Nathan Committee considered that, if charitable trust objects were outdated and the funds were not serving contemporary society as effectively as they might, those objects should be capable of variation before they became "impracticable". The Committee rejected any legislative specification of the alternative employment to which trust funds might be applied, as these specifications might themselves be overtaken by time and change.[149]

Instead, the Nathan Committee recommended generalized legislation, which would require trustees to initiate, and the relevant English scheme-making authority to come forward with, schemes for the variation of trust objects in a broadly defined set of circumstances that would clarify, or add to, the existing circumstances in which the *cy-près* power might be invoked. The trustees and the authorities would be required by the proposed legislation to have in mind a series of considerations, including the interests of the locality or community that the trust in question was serving, and the possibility of effecting greater efficiency by grouping, amalgamating or combining trusts with similar purposes. Where trusts were brought together in this way, the scheme would set out common purposes for the combined trust property. Overall, the persons drafting schemes would be required to consider the public interest, existing conditions, and – something that the Committee underlined – "the spirit of the intention of the founders".[150]

With this last consideration, the new scheme-making power would avoid the restriction of the common law *cy-près* variations, but retain a concern for the general aims that the founder or founders of the charitable trust had in mind. In this way, the authorities and the courts would no longer, as under the *cy-près* doctrine, be searching for objects that would come close to a founder's intention, which could have become totally outdated;[151] nor would the possibility exist of prolonged and expensive litigation concerning the proper construction of the original trust instrument. On the other hand, a continuing concern for the spirit of the original intentions would allay fears that tampering with the original objects might adversely affect the willingness of members of society to donate their property to charity, or that later variations would do violence to the trust objects selected initially. The Committee was of the view that its recommendations struck a fair balance between these concerns and the need for wider judicial scheme-making powers.

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[147] Nathan Committee Report, *supra*, note 41, para. 119.

[148] *Ibid.*, ch. 9.

[149] *Ibid.*, paras. 319 and 93.

[150] *Ibid.*, paras. 322 and 365(c).

The Nathan Committee reported in 1952, and its proposals were enacted generally in the *Charities Act, 1960*.[152] Its recommendations on the scheme-making power were enacted in section 13 of the Act, which provides, in part, as follows:

> 13.—(1) Subject to subsection (2) below, the circumstances in which the original purposes of a charitable gift can be altered to allow the property given or part of it to be applied cy-près shall be as follows: -
>
> (*a*) where the original purposes, in whole or in part, –
>
> (i) have been as far as may be fulfilled; or
>
> (ii) cannot be carried out, or not according to the directions given and to the spirit of the gift; or
>
> (*b*) where the original purposes provide a use for part only of the property available by virtue of the gift; or
>
> (*c*) where the property available by virtue of the gift and other property applicable for similar purposes can be more effectively used in conjunction, and to that end can suitably, regard being had to the spirit of the gift, be made applicable to common purposes; or
>
> (*d*) where the original purposes were laid down by reference to an area which then was but has since ceased to be a unit for some other purpose, or by reference to a class of persons or to an area which has for any reason since ceased to be suitable, regard being had to the spirit of the gift, or to be practical in administering the gift; or
>
> (*e*) where the original purposes, in whole or in part, have, since they were laid down, –
>
> (i) been adequately provided for by other means; or
>
> (ii) ceased, as being useless or harmful to the community or for other reasons, to be in law charitable; or
>
> (iii) ceased in any other way to provide a suitable and effective method

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[151] For example, the redemption of British slaves in Turkey or Barbary: see *Att.-Gen. v. The Ironmongers' Co.* (1841), Cr. & Ph. 208, 41 E.R. 469, aff'd (1844), Cl. & Fin. 908, 8 E.R. 983.

[152] *Supra*, note 69.

> of using the property available by virtue of the gift, regard being had to the spirit of the gift.

Section 13 expands the common law *cy-près* jurisdiction, it does not replace it; indeed, section 13(2) is careful to state that general charitable intent is still required where it is a requirement of the case law. However, section 13(1) lists eight types of circumstance to which the jurisdiction shall now extend, and at least six of these permit *cy-près* application of trust property where it was not previously possible. The remaining two instances appear to be a clarification of the existing jurisdiction.[153]

Perhaps the wisest and most significant of the new circumstances is that contained in section 13(1)(*e*)(iii), which permits a *cy-près* scheme "where the original purposes, in whole or in part, have, since they were laid down . . . ceased in any other way to provide a suitable and effective method of using the property available by virtue of the gift, regard being had to the spirit of the gift". It would seem from English commentaries[154] since the passage of the Act that the limits of this last provision have yet to be discovered. Another highlight of the section, and perhaps the most interesting provision, is that trustees are now under an actual duty to see that trust property is applied *cy-près*, "where the case permits and requires".[155]

To place these changes in context, the central aim of the *Charities Act, 1960* is four-fold: to bring about the modernization of a single charitable trust's activities; to harmonize the operations of all charitable trusts; to provide a mechanism for securing the continuity of such modernization and harmonization; and to dovetail private giving and charitable work with the publicly funded social services.

Finally, we should refer to the matter of public appeals and unexpended funds. When the *Charities Act, 1960* was before Parliament, a clause was introduced to solve the problem created by public appeals. Section 14 of the Act provides that, where property is given for "specific charitable purposes"[156] by persons who cannot be identified or found, or who have executed a written disclaimer of the right to have the property returned, the property in question may be applied *cy-près*. The section specifies that, whether there is identifiability shall be determined on the basis of the results of such advertisements and inquiries as are reasonable. It then provides that, where that procedure would be unlikely to establish the identity of donors, whether a scheme may be made of the property in question depends upon the amount of, and manner in which, property was given. Where identification is most unlikely,[157] *cy-près* application is as of right, but in other cases[158] it is at the discretion of the court. Essentially, the section abolishes the need for proof of general charitable intent in the case of unexpended funds following public appeals, but proceeds on the basis that unused moneys should be returned, not only to donors who are identifiable and traceable but to certain donors who, it would appear, are not readily within that description. Only the property donated by the remaining donors may be applied *cy-près*.

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[153] For comment on section 13(1), see Hill, *A Guide for Charity Trustees* (1966), at 74-76; *Tudor on Charities*, *supra*, note 9, at 352-53; and Cracknell, *supra*, note 139, at 142 *et seq*.

[154] See, for example, Hill, *supra*, note 153.

[155] *Charities Act, 1960*, *supra*, note 69, s. 13(5). Under s. 18(6) of the Act, the Charity Commissioners are enabled to request the Home Secretary to refer the matter to themselves where, in their view, trustees have unreasonably refused or neglected to apply to the Commission for a scheme.

[156] The section is discussed in Cracknell, *supra*, note 139, at 144-46.

b. Australia and New Zealand

Of the Australian states, Western Australia[159] and Victoria[160] each have a statutory broadening of the common law *cy-près* power comparable to the statutory provisions in England. In two other states, legislation of limited form affecting the *cy-près* jurisdiction has been enacted, but every state has some statutory provision that deals with the administrative aspect of charitable trusts.[161]

A scheme, as we have seen, is an administrative plan, either supplying certainty of administrative means and trust objects, or varying original or substituted objects where the trust cannot otherwise operate, and this historic distinction continues to be made in Australia. As to the variation of trust objects, New South Wales has legislated for "dormant funds",[162] and Queensland makes provision for funds raised by public collection.[163] Western Australia, however, has put the *cy-près* jurisdiction largely on a statutory basis, as in England, except that the legislation expressly excludes the distinction between a general and a particular charitable intent.

Victoria, too, has broadened the scope of *cy-près* schemes. Section 63(2) of the *Religious Successory and Charitable Trusts Act 1958*, which applies to a wide range of trusts, provides that trustees may apply to the Supreme Court of Victoria, with the Attorney General as party to the application, for leave to expend the trust property in question upon "such further purposes as are necessary or desirable in order to carry out the purposes of the trust or to make them fully effective". The Supreme Court may also authorize further powers which "are incidental to the carrying out of" the original purposes.[164]

With regard to the administrative machinery of the charitable trust, not only have all the Australian jurisdictions retained the general scheme-making power, derived from the ecclesiastical and Chancery courts in England, whereby missing elements may be supplied and ambiguities clarified, but the statutes complement this power. The Australian courts are enabled by the enactment, in each of the states, of legislation akin to the English *Charities Procedure Act*[165] to confer added administrative powers upon trustees, and to approve the carrying out by trustees of administrative acts that are necessary or desirable, but not authorized by the trust instrument.

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[157] For example, where the funds have been collected by street or door-to-door solicitations, or tickets have been sold for entertainments.

[158] The Act gives no definition or examples of these cases.

[159] *Charitable Trusts Act, 1962*, W. Austl. Acts 1962, No. 82, s. 7.

[160] *Religious Successory and Charitable Trusts Act 1958*, Vict. Stat. 1958, No. 6357, s. 63.

[161] See, further, Meagher and Gummow, *supra*, note 5, at 200-04.

[162] *Dormant Funds Act, 1942*, Pub. Acts N.S.W. 1824-1957, No. 25.

[163] *Charitable Funds Acts, 1958 to 1964*, Queensl. Stat. 1964, No. 40.

[164] *Supra*, note 160, s. 63(2)(a).

However, as the Nathan Committee in England said,[166] there are limitations upon the jurisdiction conferred by the *Charities Procedure Act*, principally that it is restricted to actions between trustees and the objects of the trust. And, in fact, Australian charitable trustees apparently take advantage of the general statutory power of the courts under the particular state trustee legislation to enlarge administrative powers – a power that is exercisable in relation to all trusts, and that permits the addition of trustee powers where a case is shown.[167] This power is familiar in common law Canada, having been adopted from the English *Trustee Act, 1925*, and we have already recommended its adoption in Ontario.[168] However, the power of the courts under the trustee legislation and under the *Charities Procedure Act* are not identical. The jurisdiction under the trustee legislation does not enable the courts to draw up a *cy-près* scheme, while, under the *Charities Procedure Act* and its equivalents, the courts may either enlarge the administrative powers of the charitable trustees or direct a *cy-près* scheme.

The scheme-making powers contained in the Western Australia legislation, the *Charitable Trusts Act, 1962*, is, in fact, adopted from the New Zealand *Charitable Trusts Act 1957*.[169] Section 32 of the New Zealand Act applies to all charitable trustees, and permits the Supreme Court to approve a scheme for new charitable purposes – which need no longer be "as near as possible" to the original purposes – where it is "impossible or impracticable or inexpedient" to carry out the given purpose, or the property available is inadequate, or the purpose has already been carried out, or the purpose is "illegal or useless or uncertain". The section also provides for the authorization of an alternative application of funds that are surplus to the needs of the trust purposes.

In all these instances, the court under the New Zealand legislation is to proceed "whether or not there is any general charitable intent".[170] Although the reasons for this provision are understandable, it is unfortunate that section

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[165] *The Charities Procedure Act, 1812*, commonly known as Sir Samuel Romilly's Act, was passed in England in 1812, 52 Geo. 3, c. 101 (U.K.). For the equivalent legislation in each of the Australian states, see Meagher and Gummow, *supra*, note 5, at 200-03.

[166] Nathan Committee Report, *supra*, note 41, para. 78.

[167] See Meagher and Gummow, *supra*, note 5, at 202, for the relevant legislative provisions.

[168] See, *supra*, ch. 4, sec. 3(e), and Draft Bill, s. 63.

[169] *Charitable Trusts Act 1957*, *supra*, note 45. Indeed, the draftsmen of the English *Charities Act, 1960* may also have benefited from this legislation. See Kelly (ed.), *Garrow and Kelly's Law of Trusts and Trustees* (5th ed., 1982), at 163-68, for a full account of the New Zealand Act.

[170] *Charitable Trusts Act 1957*, *supra*, note 45, s. 32(1).

32(3) also provides that the section shall not operate where "in accordance with any rule of law the intended gift thereof would otherwise lapse or fail", and the property not be applicable to charitable purposes. Gifts for specific charitable institutions "lapse or fail" if the institution in question ceases to exist before the instrument of gift takes effect, and the language of the instrument reveals that the intention of the donor was to benefit only that particular institution. If, on the other hand, he can be shown to have selected the institution as a mere instance of the kind of charitable activity he wished to promote – that he had a general charitable intent – then the gift does not lapse, but may be applied *cy-près* to other charitable purposes.[171] Section 32, like section 7 of the Western Australia *Charitable Trusts Act, 1962*, does not appear to have any solution to this internal contradiction.

Section 33 of New Zealand's *Charitable Trusts Act 1957* provides for the administration of charitable trusts. Where the administration would be facilitated "by extending or varying the powers of the trustees or by prescribing or varying the mode of administering the trust", the powers of the trustees may be extended or varied. Sections 34 to 37 of the Act provide that the trustees must prepare a scheme, which must secure the approval of the Attorney General, and that the trustees may then apply to the Supreme Court for approval. The proposed scheme has to be filed with the Court, and public inspection is available without payment of a fee. Notice of the application to the Court must be advertised not less than one month before the hearing, and any person may oppose the scheme on the giving of seven days' notice. The Western Australia legislation adopts these provisions as well.[172]

Section 33 was a new provision in the New Zealand *Charitable Trusts Act 1957*, and it is not without significance that in the same year, under the *Trustee Act 1956*, a novel statutory power "to rearrange trusts" came into effect.[173] Moreover, in 1960 New Zealand repealed this provision, replacing it with a new power to vary trusts, which is almost identical to the Ontario *Variation of Trusts Act*.[174] This Act, it will be recalled, applies to all private trusts and extends to the Supreme Court a similar power to add or vary administrative powers. It is also interesting that, whereas the *Variation of Trusts Act* enables the Court to vary or revoke any object, or beneficial interest, of a private trust, provided only that it is a variation or revocation that benefits enumerated classes or beneficiaries, New Zealand would appear to have considered it inappropriate to authorize the amendment of charitable trust objects with the conferment upon the courts of a similar broad power. Instead, the existing *cy-près* power is merely extended, although to a considerable degree; specific additional circumstances are set out in which a *cy-près* scheme may be ordered.

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[171] See *Garrow and Kelly's Law of Trusts and Trustees*, *supra*, note 169, at 172-73.

[172] *Charitable Trusts Act, 1962*, *supra*, note 159, ss. 8-12. Sections 13-19 add further provisions concerning scheme-making.

[173] *Trustee Act 1956*, Repr. Stat. N.Z. 1977, No. 61, s. 64(2), which came into force on January 1, 1957. See, also, Hamilton, "The Trustee Act, 1956" (1957), 33 N.Z.L.J. 7, at 8-9.

[174] *Trustee Amendment Act 1960*, Stat. N.Z. 1960, No. 101, s. 9, adding a new s. 64A to the *Trustee Act 1956*.

It would be interesting to know why, in 1957, this was done, and why, after 1960, the judicial powers with respect to public trusts were not brought into line with judicial powers relating to private trusts. The effect, however, is that, whereas an arrangement may be put before the court varying or revoking any aspect of a private trust, the objects of a public, or charitable, trust can only be changed or replaced within the scope of section 32 of the *Charitable Trusts Act 1957*,[175] while administrative powers may be extended or altered by the broadly worded judicial power under section 33 of that Act.

With respect to the issue of public appeals and unexpended funds, legislation in three Australian states,[176] and in New Zealand, provides, wholly or partly, for this problem. The New Zealand *Charitable Trusts Act 1957* contains three distinct features.[177] First, although the terms of the public appeal trust must be charitable, section 38 of the Act enumerates eleven factual situations with which public appeals tend to be concerned, and provides that these shall be charitable for the purposes of the Act, whether or not the case law would lead to the same outcome. Secondly, in approving any scheme, the courts are not to be concerned with particular or general charitable intent. This is made irrelevant by section 40 of the Act. Under section 49, any donor who can establish the fact and amount of his gift may recover the whole or the unexpended part, less a deduction for the reasonable expenses of the appeal that have yet to be paid.

The Act authorizes the approval of schemes for the employment of unexpended funds, enumerates in section 40 the circumstances in which this may be done, but introduces the contributors to the fund as those who decide upon the terms of the scheme, whether the proposed scheme contains new provisions for the administration of the fund or new trust purposes. After advertising for other contributors,[178] and including his proposals in the advertisement, any contributor may convene a meeting of the donors at which the proposals will be discussed. Provided there has been similar advertisement, any contributor may put forward his own proposals, and, finally, the proposals *in toto* are voted upon. The contributors then appoint a committee, which formulates a scheme on the basis of the successful proposals. The scheme is forwarded to the Attorney-General, and after his approval is obtained, with or without amendment, the scheme goes into effect. In other words, the approval of the Attorney-General is as efficacious as that of the courts. Only in the case of trusts with funds less than £200,[179] or where more than five years have passed since the contributions were made, may the

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[175] New objects need no longer be "as near as possible" to the original purposes, however, and the section attempts to remove the distinction between particular and general charitable intent, which is the other characteristic of the inherent *cy-près* jurisdiction.

[176] New South Wales *Dormant Funds Act, 1942*, *supra*, note 162; Western Australia *Charitable Collections Act, 1946*, W. Austl. Acts, 1946, No. 33; and Queensland *Charitable Funds Acts, 1958 to 1964*, *supra*, note 163.

[177] *Charitable Trusts Act 1957*, *supra*, note 169, ss. 38-50. See *Garrow and Kelly's Law of Trusts and Trustees*, *supra*, note 169, at 166-67.

[178] A claims contributor will decide from the evidence who was a contributor: see *Charitable Trusts Act 1957*, *supra*, note 45, s. 45(*a*) and (*b*).

[179] This amount is now expressed in N.Z. dollars.

Attorney-General permit the formulation of a scheme without a meeting of the contributors.[180]

The provisions of the New Zealand Act that set out what shall be done in the case of public appeals are lengthy and detailed, but there is an unequivocal adoption of the principle that those who give to an appeal should decide how unexpended funds are to be spent. The difficulty with these provisions seems to be that many *bona fide* contributors will be unable to satisfy the claims committee, set up at the meeting, that they were donors to the fund. This would appear to include all those who gave anonymously, whether in large or small amounts, and such persons may have contributed the greater part of the fund.

(c) ALTERNATIVES FOR REFORM

In any statutory reform of the law concerning the variation and reorganization of charitable trusts in Ontario, there would appear to be two alternative ways in which the law might be changed.

The first approach would be for statute to enable the courts to enlarge or vary the administrative powers that the trust instrument confers upon the trustees, and, for the purpose of implementing such a change, section 33 of the New Zealand *Charitable Trusts Act 1957* would appear to be a totally satisfactory model. As to the variation of charitable trust objects, that is, the purpose or purposes that the trustees are to pursue, statute could enumerate the circumstances in which such a variation might be made. This is the approach of the *Charities Act, 1960*, in England, and also of the *Charitable Trusts Act 1957* in New Zealand, which, as we have seen, was adopted later in Western Australia.

The result of a change along these lines would be that, in order to vary the administrative and management powers of the trustees, the courts would possess an authority that would be as extensive and shortly expressed as that to be found for private trusts in the *Variation of Trusts Act*. No need would arise for the courts to fall back on any authority that is conferred upon the courts by the trustee legislation, and this is what the New Zealand and Western Australia charity legislation achieves. The powers contained in trustee legislation are essentially designed for private trusts, or trusts with human beneficiaries, as opposed to purposes.

So far as the variation of charitable trust objects is concerned, the change would take the form of an extension of the time-honoured *cy-près* scheme-making power. Apart from making such an extension, however, the English legislation expressly retains the case law, which includes the need, in the circumstances that we have discussed, of a general charitable intent. The New Zealand and Western Australia legislation is less certain about the degree to which it wishes to retain the characteristics of the case law *cy-près* jurisdiction, as can be seen in the ambiguity of the provisions concerning general charitable intent. However, although this legislation makes a determined effort to discard the technicalities of the *cy-près* power, and in particular the need to select purposes as close as possible to the original, these statutory innovations are clearly conceived in the mould of the *cy-près* power. None of this legislation is prepared to allow variation of charitable trust objects wherever and whenever the court considers it necessary or desirable, and to leave it at that. In this sense, the Victoria legislation is broader in the authority that it confers upon the courts, although otherwise narrower in scope as to the charitable trusts to which it applies.[181] In general, then, the courts in these jurisdictions have a more extensive and simply stated power to vary objects when they are concerned with private trusts and are acting under their respective Variation of Trusts Acts.

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[180] The *Charitable Trusts Act 1957*, *supra*, note 45, ss. 42-50, sets out the provisions described in this paragraph.

The second approach that the statute might take would be to confer an authority upon the courts to make *any* variation of objects or enlargement of trustee administrative powers, and to do so whenever the courts consider it necessary or desirable. To date, no jurisdiction appears to have gone this far, but for public, or charitable, trusts it would seem to be the logical counterpart of the authority that variation of trusts legislation creates for private trusts.

(d) Conclusions

In our view, any choice for reform must be governed largely by the nature of charitable trusts in Ontario, and the customary modes of charitable giving. Charitable trusts and corporations in Ontario, as in the other provinces of Canada, have neither the age nor the infinite variety of charitable trusts in England and Wales. There, the hand of history lies heavy, stretching back over four centuries to the Tudor period, and beyond that in the case of many trusts, including those associated with colleges, cathedrals and churches, to origins in the twelfth century. The multitude of these trusts is extraordinary, reflecting every stage in, and facet of, the social, religious, economic, and national evolution of English and Welsh life over the centuries. Indeed, their number and variety were not known until registration began in the nineteenth century, and even then it was many decades before the Charity Commissioners could reasonably estimate that they had discovered them all, so small in funds and local in character were many of the trusts.[182]

Inevitably, the earliest charitable trusts in Ontario date back for all practicable purposes to the first half of the nineteenth century. The opening up of a new country from virgin lands gave Canadian charitable trusts and corporations a simpler and more similar character, the one to another. Religious charities have always predominated in number, a characteristic of charity associated with the prime convictions of so many immigrants and settlers of European origin, and Canada has never possessed anywhere near the variety of trusts that in England and Wales fall into the miscellaneous fourth category of charitable trusts whose only real theme is the benefit of the public or a section thereof. In short, a smaller population, a history of more recent origin, and a different structure of society caused by the early shared experience of pioneering, had produced by the time of the First World War a smaller and less varied scene of charitable activity, although the same law of charity applied in Canada as in England.

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[181] *Religious Successory and Charitable Trusts Act 1958*, *supra*, note 160, s. 19.

[182] Professor Gareth Jones has written a vivid account of the development of the law of charity in England from the fall of Sir Thomas More (1532) to the beginnings of the emergence of the modern system and law in 1830, the dawn of the great Liberal reform movement: see, *supra*, note 125.

Then came taxation and relief for charities. Succession duty was first levied in 1892, and federal income tax commenced in 1917. From this latter date, however, as we have previously noted, relief was given, not as in England to outright gifts and gifts by way of trust to charitable purposes, but to charitable institutions and thus to gifts to such institutions.[183] As a consequence, such was the increasing importance of tax and duty relief after the 1914-18 War, that the focus of charitable activity became the institution. In 1967, registration of such an institution as a charity with the Department of National Revenue was made a requirement before the Department would permit donors to deduct from income their gifts during the taxation year to the charitable institution. Today, whether or not an institution receives new gifts, registration and annual returns to Revenue Canada are necessary before a charity can receive relief from taxation on its own income generated by the investment of its capital.

Charities that are incorporated may freely amend their articles of association in order that their activities, both as to purposes and as to manner of operation, are kept abreast of the needs of the time, but charitable trusts must look to an inadequate law of charity, which is a provincial matter, for the facility to amend. In our view, what is called for is a simple and expeditious mode of amendment, which keeps the cost of such a change to a minimum, while protecting the public interest in the permitted modes of expenditure of charitable funds and in the use of real property in the ownership of charities, by the surveillance of a public official in addition to that of the courts. The public official would keep all variation and enlargement of trustee powers under review, while the court, assisted by the public official, would be concerned with the individual applications for amendment that are brought before it.

We have observed also that, although the law of charity, as developed by the courts in England, has been and continues to be applied in Ontario, the legal profession in Canada appears less attracted to the minutiae and the commonly admitted technicalities of the law of charity than is the case in England. We hasten to add that this comment is not, nor is it intended as, a criticism of the approach taken in either country. Either approach in our view is defensible. It is merely that, against the background of the different and simpler circumstances in this country, the profession in Canada evidently sees less need for the many nice distinctions that have developed in English charity law.

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[183] See, for example, Waters, *supra*, note 1, at 454. The first succession duty relief was for gifts for charitable "purposes". As a result of the language of the federal 1917 legislation (*The Income War Tax Act*, S.C. 1917, c. 28), levying an income tax, Ontario followed suit and granted relief from succession duty for gifts to charitable organizations, until succession duty was abolished in Ontario in 1979 by *The Succession Duty Repeal Act, 1979*, S.O. 1979, c. 20.

We have therefore concluded that, in principle, the second of the alternative policies that we outlined previously is more appropriate for Ontario. Nonetheless, we would add some features to a policy that, as it stands, would extend to the courts a complete freedom to vary charitable trust terms, including trust objects, and to enlarge trustee administrative powers, as the court thinks fit. We think that, given the fact that considerable funds and property may be involved, and that the public has a legitimate interest in the fate of funds and land that have been dedicated exclusively to the public, as opposed to any private, benefit, some guidance should be offered to the courts concerning what sorts of change the legislature has in mind. We also consider it important, as did the Nathan Committee in England before us, that would-be donors as members of the public should not be made apprehensive that their intentions may be totally ignored at some later stage when trustees and others form the view that the donated property could usefully be expended, or even administered, in different ways. Once property is alienated by a donor, he has no further legal interest in it, but, in our view, it would be undesirable for the legislature to act in such a way as might adversely affect the springs of charity.

The proposals that we make would confer upon the courts a simply expressed and broad power both to amend the administrative provisions of charitable trusts, including permitting the amalgamation or incorporation of trusts, and to vary trust objects. We would retain, however, the existing concept that the jurisdiction comes into existence where, in the view of the court, any impossibility or impracticability in carrying out the donor's instructions has occurred. We would add to these criteria, "or any other difficulty", in order to release the court from any restricted interpretation that case law has placed upon the words impracticable and impossible. Accordingly, we recommend that, upon application by the trustees of a charitable trust, or, in the absence of such trustees, by the personal representatives of a testamentary donor, the court should be able to amend, replace, delete or otherwise vary any term of the trust, or to enlarge the powers of the trustees to administer the trust, if the court finds that any impracticability, impossibility, or other difficulty has arisen, whenever it arose, that hinders or prevents the carrying out of the intention of the terms of the trust.[184]

In addition, we believe that it should be possible to obtain a variation or an enlargement of powers where this would assist the trustees to carry out the general intention of the donor. Since gifts to charity in Ontario, as in Canada at large, will, in the great majority of cases, be made to organizations already registered as charities, the problem is essentially one of access to the courts by trustees of existing charitable trusts for the purpose of securing the variation of terms and the enlargement of powers. It is in these applications in particular that we think the general intention of the donor or donors should be the guiding principle, although obviously it would be possible to obtain a variation or enlargement of powers under our previous recommendation where the named institution never existed, or has gone out of existence prior to the instrument of gift taking effect. The donor's general intention would extend to cover "the spirit of the gift", a term that, it will be recalled, is used in section 13(1) of the *Charities Act, 1960* in England. Accordingly, we recommend that the court should be able to amend, replace, delete or otherwise vary any term of a trust or to enlarge the powers of the trustees to administer the trust where it finds that a variation of the terms of the trust or an enlargement of the powers of the trustees would facilitate the carrying out of the intent of the terms of the trust.[185]

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[184] Draft Bill, s. 76(1)(*a*).

When a variation of objects is to be made, we are of the view that the common law requirements for a *cy-près* scheme, namely, the existence of a general charitable intent where there is initial impossiblity or impracticability, and a choice of new objects that are as close as possible to the original purposes, should be relaxed significantly. This is the policy adopted by the New Zealand and Western Australia Charitable Trusts Acts, and we agree with that policy. Construction actions to discover whether the donor had a particular or general charitable intent have led to prolonged and expensive litigation, as the reported cases show, and the necessity of selecting varied objects that are as close as possible to the donor's own purposes can hamper the application of charitable funds to contemporary needs. We would abolish the former requirement, saving only a gift over or a reversion where the donor has expressly set out such an intention in the trust instrument,[186] and modify the latter by permitting the court to approve or select substituted objects that are as close as is practicable or reasonable to the objects being varied.

Such modification does not go as far as the New Zealand and Western Australia legislation, which permits any substituted objects provided they are charitable. We do not think a gift for the relief of pain and suffering, for instance, should be directed into another head of charity, such as the advancement of religion, if the general intention, that is, the donor's chosen field of charitable activity, can be honoured. The guidance to the court that we propose is the selection of a substituted object that is as close to the existing purpose as is practicable, or, given the case law limitations on that word, reasonable in the circumstances at the time of the application to the court. We think this is an acceptable legislative course, given the need for flexibility and, at the same time, our desire not to cause apprehension to would-be charitable donors.

Accordingly, we recommend that, for the purposes of any variation of any term of a charitable trust, it should be irrelevant whether the donor had a particular or general charitable intent. However, where an instrument of gift expressly provides for a gift over or a reversion in the event of the lapse or other failure of a charitable object, the gift over or reversion, if otherwise valid, should take effect.[187] Moreover, we recommend that, for the purpose of a variation, the court should be required to approve or select one or more purposes as close as is practicable or reasonable to the original or previously varied purpose or purposes.[188]

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[185] *Ibid.*, s. 76(1)(*b*). The Commission considered, but rejected, the possibility of making specific reference in the provision in the revised Act dealing with variation of charitable trusts to trusts by way of endowment. We concluded that such trusts, and the problems raised by such cases as *Halifax School for the Blind v. Chipman*, [1937] S.C.R. 196, [1937] 3 D.L.R. 9, and *Re Bell* (1980-81), 7 E.T.R. 129 (Ont.), should be dealt with as part of a general review of the law of charity.

[186] Such a gift over or reversion can only be valid, of course, where it satisfies the requirements of the perpetuity rule, including the *Perpetuities Act*, *supra*, note 21.

With respect to public appeals and unexpended funds, we have not been persuaded that Ontario should adopt provisions modelled upon either those of the *Charities Act, 1960* in England, or those of the New Zealand or Australian legislation. It seems to us that, although the English provision simplifies matters by abolishing the need for proof of a general charitable intent, it then carries the right of contributors to the return of their gifts to such a length that this appears to become the principal concern of the provision. *Cy-près* application is only possible where discovery of the donor is clearly impossible, or where the court in its discretion considers a donor to be not reasonably identifiable. We also doubt whether the attendant complexity of this provision would be welcomed in Ontario.

As for the New Zealand legislation, which we earlier considered, this introduces the attractive idea of allowing the donors themselves to propose *cy-près* application of unexpendable funds. However, it would appear that excluded from this procedure are all but the donors who can prove they were donors, and this obviously favours the named corporate donor and the gift by way of a cheque over the many other donors and ways in which contributions may have been made. With this outcome much of the attraction of the idea disappears.[189]

However, we favour the notion that all funds raised as the result of a public appeal, that is, whether or not the original objects of the trust are charitable, should be capable of being applied to alternative purposes or in other ways.[190] We would merely require that the alternative, or substituted, terms be charitable, so that, otherwise, charity continues to be the exclusive framework of public benefit. In this way, we would recognize in an appeal to the public, and the public's response, the element of public concern that society should foster, whether or not the objects of the contemplated trust are in law charitable. Accordingly, we recommend that, where as a result of an appeal to the public for support of any one or more objects, whether charitable or otherwise, any property is held by trustees for such object or objects, our previous recommendations concerning the variation of charitable trusts should apply, except that the object or objects when varied by the court should be exclusively charitable.[191] Accordingly, the distinction between particular and general charitable intent in the context of public appeals would be abolished. The logic of this abolition, as we see it, is that, as a general rule, funds donated by a donor for a charitable purpose would not subsequently be returnable.

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[187] Draft Bill, s. 76(2)(*a*).

[188] *Ibid.*, s. 76(2)(*b*).

[189] Although in Canada, if the cause of the appeal is charitable, it is likely that most direct donors will acquire and retain tax-deductible receipts.

[190] We would thus avoid the inapplicability of s. 13 of the English Act to a case like *Re Gillingham Bus Disaster Fund*, *supra*, note 71, because of a direction to expend part of the funds on non-charitable purposes. Such inapplicability also seems likely with the New Zealand and Western Australia legislation, save insofar as any trust instrument is made exclusively charitable by the statutory power of saving imperfect trust provisions.

However, as we have said before, if recovery is what a donor wants, we have no desire to prevent him from recovering the property he has donated where the existing law permits him such a recovery. We would merely require the donor to record his name as a donor, and to express his intention in writing at the time of executing his will or otherwise making the gift that, in the event of his chosen purpose failing, or his chosen institution lapsing, the property that he has donated, or the unexpended portion of it, less any reasonable deduction towards the trustees' expenses in connection with the donation, shall be returned to him. In other words, any resulting trust must be express;[192] none will be implied. We think this is a reasonable solution to the problem experienced in all jurisdictions that have attempted to legislate for surplus funds.

Accordingly, we recommend that the revised Act should provide that, if a donor is identifiable and if he indicated in writing at the time he made the donation that, in the event of an inability on the part of the trustees to expend the trust property upon the one or more objects of the trust, his donation, or the unexpended portion thereof, should be returned to him, the trustees should be required, before an application is made to the court to vary the trust, to return the donation, or a *pro rata* portion thereof, less a reasonable deduction to meet the proper expenses of the trustees in connection with the donation.[193]

The protection of the public interest in all these matters should clearly be placed in the hands of the Public Trustee, given his existing statutory tasks in relation to charitable gifts and institutions.[194] We have not followed English legislation and required the Public Trustee to formulate schemes of variation for trustees, a task that in England is placed principally upon the Charity Commissioners; nor have we followed the New Zealand and Western Australia legislation, which requires the Attorney General to approve a scheme before it is put to the court. We think that it is more compatible with practice in Ontario that trustees should originate their own proposals, and that the Public Trustee should have adequate notice of these proposals so that he may effectively represent the public interest when he appears with the applicants in court. In effect, we suspect an accommodation of any differences will normally be made before the judicial hearing. In fact, with these proposals we are actively seeking a continued atmosphere of cooperation between charitable trustees and the Public Trustee. This, we think, is the best policy for the Province to follow. Accordingly, we recommend that no order should be made by the court to vary the terms of a charitable trust or to enlarge the administrative powers of trustees or with respect to surplus moneys from public appeals unless notice has been given to the Public Trustee at least one month prior to the application to the court.[195]

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[191] Draft Bill, s. 77(1). Dr. Derek Mendes da Costa, Q.C., Chairman of the Commission, dissents in part from this recommendation:

> In my opinion, it is undesirable to restrict the court's power by requiring that the objects, when varied, should be exclusively charitable. I would point out that the Commission's recommendation applies whether or not the original objects of the trust were charitable. Moreover, the provisions of section 76 of the Draft Bill seem to me to provide adequate safeguards.

[192] This also includes a gift to a charitable organization with a gift over should the charitable organization close its doors within the perpetuity period.

[193] Draft Bill, s. 77(2).

[194] See, further, Waters, *supra*, note 1, at 537-47.

We have not recommended the placing of a statutory duty upon trustees to originate proposals where they might reasonably consider that the occasion has arisen for an approach to the court. In this we again depart from the English Act, and from the New Zealand and Western Australia legislation. The fiduciary duty of trustees already necessitates that they have always in mind their statutory rights to appeal to the courts for assistance whenever the best interests of the trust call for such an appeal, and, in the absence of any evidence that charitable trustees in Ontario are likely to ignore their fiduciary obligations, we are content to leave trustees to the recognition of their obligations. We are also mindful that the Attorney General and the Public Trustee, with their respective inherent and statutory authority in relation to charitable trusts, are capable of ensuring that trustees' duties are discharged properly.

RECOMMENDATIONS

The Commission makes the following recommendations:

1. As recommended in chapter 1 of this Report (Recommendation 5), until the topic of charity law reform has been examined in detail, the revised *Trustee Act* should not apply to charitable trusts or non-charitable purpose trusts, except to provide specific provisions for the variation and reorganization of charitable trusts and the remedying of imperfect trust provisions.

2. The term "imperfect trust provision" should be defined in the revised *Trustee Act* to mean a trust under which a non-charitable as well as a charitable purpose is included or could be construed as being included in the object or objects of the trust to or for which an application of the trust property or any part thereof is directed or allowed by the trust.

3. The revised *Trustee Act* should provide that a trust for both non-charitable and charitable purposes shall not be held to be invalid for the reason only that it is an imperfect trust provision.

4. The revised *Trustee Act* should provide that, subject to Recommendations 5 and 6, every imperfect trust provision shall be construed and given effect to as if no application of the trust property or any part thereof to or for any non-charitable purpose had been or could be construed to have been authorized.

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[195] Draft Bill, s. 80.

5. Where under an imperfect trust provision property is held on trust that is valid by virtue of section 16(1) of the *Perpetuities Act*, the non-charitable purpose so validated should be permitted for the time period provided by that Act; however, at the end of the permitted period, section 16(2) of the *Perpetuities Act* should not apply, and any remaining property should be dedicated exclusively to the charitable purposes set forth in the trust instrument.

6. The revised *Trustee Act* should provide that, where under the terms of an imperfect trust provision the trustees are expressly or impliedly directed to apply a part of the trust property to or for any non-charitable purpose, Recommendations 3, 4, and 5 shall not apply, and the existing law shall govern.

7. The revised *Trustee Act* should provide that Recommendations 2 to 5 apply to any imperfect trust provision, except an imperfect trust provision that, before the revised Act comes into force, was declared to be invalid by a court of competent jurisdiction, or pursuant to which property, or income arising from property, was paid or conveyed to, or applied for the benefit of, one or more persons who would have been entitled by reason of the invalidity of the imperfect trust provision.

8. The revised *Trustee Act* should contain a provision to the effect that a trust that is solely for one or more specific non-charitable purposes should take effect as a power for all purposes, except with regard to any purpose that is illegal or contrary to public policy.

9. The revised *Trustee Act* should provide that a specific purpose under section 16 of the *Perpetuities Act* and under the revised Act means a purpose that, on a proper construction, is certain as the object of a power.

10. The revised *Trustee Act* should provide that, upon application by the trustees of a charitable trust, or, in the absence of such trustees, by the personal representatives of a testamentary donor, the court may amend, replace, delete, or otherwise vary any term of the trust or enlarge the powers of the trustees to administer the trust, if the court finds

    (a) that any impracticability, impossibility or other difficulty has arisen, whenever it arose, that hinders or prevents the carrying out of the intention of the terms of the trust; or

    (b) that a variation of the terms of the trust or an enlargement of the powers of the trustees would facilitate the carrying out of the intent of the terms of the trust.

11. The revised *Trustee Act* should provide that, for the purposes of any variation of the terms of a charitable trust, it is irrelevant whether the donor had a particular or general charitable intent. However, where an instrument of gift expressly provides for a gift over or a reversion in the event of the lapse or other failure of a charitable object, the gift over or reversion, if otherwise valid, should take effect.

12. For the purpose of a variation of a charitable trust, the court should be required to approve or select one or more purposes as close as is practicable or reasonable to the original or previously varied purpose or purposes.

*13. With respect to public appeals, the revised *Trustee Act* should provide that, where as a result of an appeal to the public for support of any one or more objects, whether charitable or otherwise, any property is held by trustees for such object or objects, Recommendations 10, 11, and 12 apply, *mutatis mutandis*, except that the object or objects when varied by the court should be exclusively charitable.

14. The revised *Trustee Act* should provide that, if a donor is identifiable and if he indicated in writing at the time he made the donation that, in the event of any inability of the trustees to expend the trust property upon the one or more objects of the trust, his donation, or the unexpended portion thereof, shall be returned to him, the trustees must, before an application is made to the court to vary the trust, return the donation, or a *pro rata* portion thereof, less a reasonable deduction to meet the proper expenses of the trustees in connection with the donation.

15. The revised *Trustee Act* should provide that no order shall be made by the court to vary the terms of a charitable trust or to enlarge the administrative powers of trustees or with respect to surplus moneys from public appeals unless notice has been given to the Public Trustee at least one month prior to the application to the court.

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* See, however, the dissent, in part, of Dr. Derek Mendes da Costa, Q.C., Chairman of the Commission, *supra*, note 191.

CONCLUSION

Throughout the course of its review of the law governing trusts and trustees in Ontario, the Commission's concern has been to improve and modernize the law by bringing it into line with contemporary needs and practice. Accordingly, we have sought to clarify the law where there is ambiguity, and to address deficiencies both by amending the law, where appropriate, and by conferring upon trustees and the courts additional powers to ensure effective and efficient administration of trusts.

To this end, we have recommended the enactment of a revised *Trustee Act*, which would contain, *inter alia*, an improved mechanism for the non-judicial appointment and removal of trustees, statutory powers of maintenance and advancement, and an updated and expanded list of trustees' administrative powers, including a revised power of investment. In addition, we have proposed that the fundamental duties of trustees – that is, their duties of care and impartiality and their duties in respect of delegation and the avoidance of conflict of interest and duty – should be clarified and placed in statutory form. The Report also contains a number of significant recommendations concerning contribution and indemnity among trustees, the variation and termination of trusts, the variation and reorganization of charitable trusts, and the salvaging of imperfect trust provisions.

The *Report on the Law of Trusts* represents the culmination of a great deal of work on the part of many persons, whose contributions we have gratefully acknowledged in the Foreword to the Report. We wish, however, to reiterate our expression of gratitude to Professor D.W.M. Waters for giving us the benefit of his judgment and scholarship, and for his patience and dedication throughout the project and during the preparation of the Report.

All of which is respectfully submitted.

Derek Mendes da Costa
Chairman

H. Allan Leal
Vice Chairman

Richard A. Bell
Commissioner

William R. Poole
Commissioner

Barry A. Percival
Commissioner

March 30, 1984

An Act to revise the *Trustee Act*

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An Act to revise the *Trustee Act*

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province cf Ontario, enacts as follows:

1. In this Act, Interpretation

(*a*) "assign" means the execution and the performance by a person of every necessary or suitable deed or act for assigning, surrendering or otherwise transferring property of which he is possessed, either for his whole interest or for any less interest, and "assignment" has a corresponding meaning;

(*b*) "bankrupt" means a person against whom a receiving order is in force, or who has made an assignment or a proposal under the *Bankruptcy Act* (Canada); R.S.C. 1970, c. B-3

(*c*) "conveyance" as applied to a person includes the execution and the performance by that person of every necessary or suitable assurance, act or thing for conveying, transferring, assigning, appointing, surrendering or otherwise disposing of property, and "to convey" has a corresponding meaning;

(*d*) "Court" means the Supreme Court or a judge thereof;

(*e*) "deed" for the purposes of this Act means a signed instrument, attested by one witness and accompanied by an affidavit of execution, but does not require a seal;

(*f*) "execute" includes the performance of all acts and things necessary for a conveyance;

(*g*) "income" includes rents and profits;

(*h*) "mentally incompetent person" means a person so found by a court of competent jurisdiction;

(*i*) "mortgage" is applicable to every estate or interest in property regarded as a security for money, and "mortgagee" has a corresponding meaning and includes every person deriving title to a mortgage under the original mortgagee;

(*j*) "outgoing" means payments and expenditures, whether discharged by the trustees or a beneficiary, resulting from and necessitated by the existence of the trust property, and includes expenses of administration, repairs, maintenance, insurance, taxes, payments on account of mortgages and debts, calls on shares, annuities, and business and other losses;

(*k*) "personal representative" means an executor, an administrator, and an administrator with the will annexed;

(*l*) "person of unsound mind" means a person, not being a minor or a mentally incompetent person, who is incapable from infirmity of mind of managing his own affairs;

(*m*) "property" means real property, personal property or any estate, share or interest in property, and includes any debt, chose in action, and any other right or interest in property, whether in possession or not;

(*n*) "purchaser" means a purchaser for value, and includes a mortgagee and any other person who for value has received an interest in or claim upon trust property;

(*o*) "transfer" in relation to securities includes the execution and the performance of every deed, power of attorney, act or thing on the part of the transferor to effect and complete the title in the transferee;

(*p*) "trust" does not include,

(i) a charitable trust or a non-charitable purpose trust, except as provided in Part VIII,

(ii) an estate conveyed by way of mortgage, or

(iii) a business, commercial or investment trust including, for example, a pension trust, an employee benefit and profit sharing trust, a retirement savings plan, a home ownership savings plan, a retirement income fund, or any other savings plan trust registered under the *Income Tax Act* (Canada), a trust further to a buy-sell agreement, a stock purchase agreement trust, a corporate bond trust and a voting trust, but this subclause does not exclude a trust merely because it involves, in whole or in part, the carrying on of a business;

S.C. 1970-71-72, c. 63

(*q*) "trust company" means a trust company within the meaning of the *Loan and Trust Corporations Act*;

R.S.O. 1980, c. 249

(*r*) "trust instrument" means a deed, will or other writing, including a statutory enactment, that creates or varies a trust, but does not include a judgment or order of a court;

(*s*) "trustee" does not include a person acting as the personal representative of a deceased person;

(*t*) "will" includes a testament, a codicil and any other testamentary disposition. R.S.O. 1980, c. 512, s. 1, *amended.*

PART I

APPLICATION OF ACT

Application of Act

2. Except as otherwise provided in this Act, this Act applies,

(*a*) to all trusts however and whenever created and to all trustees however and whenever appointed; and

(*b*) so far as a contrary intention is not expressed in the trust instrument, and subject to the terms of the trust instrument. R.S.O. 1980, c. 512, ss. 66, 67, 68, *amended.*

Continuation of existing law

3. Except as otherwise provided in this Act, the law respecting trusts and trustees in force in Ontario immediately before this Act comes into force continues in force. *New.*

PART II

GENERAL PRINCIPLES GOVERNING THE EXERCISE OF POWER AND DISCHARGE OF DUTY BY TRUSTEES

Duty of care

4.—(1) In the discharge of their duties and the exercise of their powers, whether the duty or power is created by law or the trust instrument, trustees shall exercise that degree of care, diligence and skill that a person of ordinary prudence would exercise in dealing with the property of another person.

Idem

(2) Without limiting the generality of subsection (1), trustees who in fact possess, or because of their profession, business or calling ought to possess, a particular level of knowledge or skill which in all the circumstances is relevant to the administration of the trust, shall employ that particular level of knowledge or skill in the administration of the trust. *New.*

Power to employ agents

5.—(1) Where it is reasonable and prudent in the circumstances so to do, trustees may employ one or more persons as agents within or outside Ontario to carry out any act required to be done in the administration of the trust, including the execution of documents, the payment, transfer and receipt of money or other property, and the giving of discharges for receipts, but excluding the exercise of any express or statutory discretion as to the transfer or distribution of trust property to or among beneficiaries of the trust.

Duty of care in appointing agents

(2) In employing an agent, trustees shall personally select the agent and be satisfied of his suitability to perform the act for which he is to be employed, and they shall carry out such supervision of the agent throughout his employment as is prudent and reasonable.

Responsibility for loss by default of agent

(3) Trustees are only chargeable for loss caused by the default of an agent if the loss is due, wholly or partly, to a breach of subsection (1) or (2), or otherwise to their negligence or wilful wrongdoing.

Trustees' right to rely on professional advice

(4) Trustees are not liable for any loss to the trust if they rely reasonably and in good faith upon a written statement of an agent who is a duly accredited member of the legal, accounting, engineering, medical or any other profession. *New.*

Delegation of powers to co-trustees

6.—(1) For the purpose of section 5, an agent includes a co-trustee.

Idem

(2) Non-corporate trustees may delegate to the extent permitted by section 5,

(*a*) to the other trustees where there are two or more non-corporate trustees; or

(*b*) to a sole co-trustee if the sole co-trustee is a trust company,

but, except where a sole trustee was originally appointed, where there are two trustees only and neither is a trust company, neither may delegate to the other. *New.*

Invalidity of exonerating clauses

7. No term in a trust instrument or in an oral declaration of trust is valid to the extent that it purports,

(*a*) to exonerate the trustees from liability for failure to exercise the degree of care, diligence and skill required by subsection 4(1);

(*b*) to exclude or lower the standard of knowledge or skill required by subsection 4(2); or

(*c*) to absolve the trustees in the employment of agents from the duty to act in accordance with subsection 5(2). *New.*

Power to delegate by power of attorney

8.—(1) A trustee may, by granting a power of attorney, delegate to any person for any period not exceeding twelve months the execution or exercise of all or any of the duties and powers vested in him as sole trustee or jointly with one or more other trustees.

(2) A trustee may delegate under subsection (1) only where the delegation would result in the duties and powers so delegated being executed or exercised by the donee and one or more other persons, except that where the donee is a trust company, it may act alone. Limitation on power of delegation

(3) An instrument creating a power of attorney under this section must be attested by at least one witness. Attestation

(4) Within seven days after granting a power of attorney under this section the donor shall give written notice thereof, specifying the date on which the power comes into effect, its duration, the name of the donee, the reason why the power of attorney is given and the duties and powers delegated, Notice

(*a*) to any other persons who have power, alone or jointly, to appoint a new trustee; and

(*b*) to any other trustees,

but failure to comply with this subsection does not, in favour of a person dealing with the donee of the power, invalidate any act done or instrument executed by the donee.

(5) The donor of a power of attorney given under this section is liable for the acts or defaults of the donee in the same manner as if they were the acts or defaults of the donor. Liability of donor

(6) The fact that it appears from a power of attorney given under this section or from any evidence required for the purposes of the exercise of any such power or otherwise that the donee of the power is acting in the execution of a trust shall not be deemed for any purpose to affect any person with notice of the trust. Notice of trust

(7) Any trust instrument conferring a power to delegate by power of attorney must do so in the terms of this section and not otherwise, but a trust instrument may exclude the power to delegate under this section. *New*. Exclusion of section

9.—(1) Trustees shall discharge their duties and exercise their powers solely in the interests of the beneficiaries of the trust, and without limiting the generality of the foregoing, they shall not knowingly permit themselves to be in a position in which their interest conflicts in any way with the discharge of their duties and the exercise of their powers, or in which they may derive any benefit for themselves or for any other person, except so far as the law or the trust instrument expressly permits. Conflicts of interest and duty

(2) Where upon application to the Court it is shown that it would be for the benefit of the trust and its beneficiaries, whether or not any beneficiary withholds his consent, the Court may make an order, on such terms and conditions as appear just, Court orders

(*a*) permitting the trustees to act notwithstanding that they may be in a position that contravenes subsection (1); or

(*b*) excusing them from liability notwithstanding that they may be in breach of trust for having acted while in a position that contravened subsection (1).

Where Court may exercise jurisdiction

(3) The jurisdiction of the Court is exercisable in cases under clause (2)(*b*) upon application of the trustees any time after the occurrence of the breach of trust, but nothing in this section affects in any way the powers of the Court under section 69.

Notice of application

(4) Unless otherwise ordered by the Court, the trustees shall give notice of an application under this section to every person having any interest in the trust.

Notice to Official Guardian

(5) Without affecting the duty imposed by subsection (4), where a minor or unborn person has an interest in the trust, the trustees shall give notice of an application under this section to the Official Guardian at least one month before the day fixed for the return of the application.

Application of section to charitable trusts

(6) Notwithstanding subclause 1(*p*)(i), this section applies to a charitable trust, in which case the trustees shall give notice of an application under this section to the Public Trustee at least one month before the day fixed for the return of the application.

Variation of order

(7) Where an order has been made under this section and the circumstances under which it was made change, the Court may, upon application by the trustees or any interested person, vary the order. *New*.

Trust company depositing funds with itself

10. Subject to clause 35(*a*) and to any similar power in the trust instrument, a trust company may deposit or invest the funds vested in it pursuant to a trust of which it is a trustee in any account maintained, or in any security issued, by itself or any affiliate or subsidiary up to, but not exceeding, the maximum insurable sum established by the *Canada Deposit Insurance Corporation Act*. *New*.

R.S.C. 1970, c. C-3

Reimbursement of expenses

11. A power in a trust instrument authorizing the trustees to reimburse themselves or to make payments directly from the trust funds for the discharge of expenses or of any other obligation properly incurred or arising in the administration of the trust is valid and the trustees are not to be regarded as acting in conflict of interest and duty in so doing. *New*.

Variation or deletion of trust terms permitting conflicts

12.—(1) Notwithstanding the terms of the trust instrument, any beneficiary of a trust may apply to the Court under section 65 for the deletion or variation of any term permitting a conflict of interest and duty.

(2) Nothing in section 9, 10, 11 or this section shall be construed as limiting the jurisdiction of the Court under section 64 or 65. *New*.

Interpretation

13.—(1) In the discharge of their duties and the exercise of their powers, whether the duties or powers are created by law or the trust instrument, trustees must act unanimously.

Unanimity rule

(2) Where it appears that the trustees are unable to achieve unanimity on a matter, one or more of them may apply to the Court for an order resolving the matter in any way that the Court considers proper. *New*.

Power of court to break deadlock

14. Subject to sections 5 and 8, and notwithstanding that all the beneficiaries are ascertained, of age, and under no disability, the powers conferred upon trustees by this Act or the trust instrument or as a result of their having title to trust property are exercisable by them solely in their own discretion. *New*.

Powers of trustees solely theirs

15.—(1) Where a power is conferred or a duty is imposed upon two or more trustees jointly, the power may be exercised or the duty discharged by the survivors or survivor of them, except that where only one trustee survives, other than a trust company, the sole surviving trustee shall only act with the consent of the Court as provided by subsection 57(1). R.S.O. 1980, c. 512, s. 25, *amended*.

Powers and duties of surviving trustees

(2) Until one or more substitute or additional trustees are appointed, the personal representatives for the time being of a sole trustee or of the last surviving or continuing trustee may exercise any power or perform any duty that was conferred upon or was capable of being exercised or performed by the sole or last surviving or continuing trustee. R.S.O. 1980, c. 512, s. 3(2).

Interim powers of personal representatives

16. Where trustees are directed or empowered to act, whether by the trust instrument, statute, or otherwise by law, and they refuse or fail to discharge the duty or to consider in good faith and decide accordingly upon the exercise of the power, upon application by a beneficiary, the Court may order the trustees to discharge the duty, or to satisfy the Court that such consideration has been given to the exercise of the power. *New*.

Complaints by beneficiaries against trustees' inactivity

PART III

APPOINTMENT AND DISCHARGE OF TRUSTEES BY ACT OF THE PARTIES

17.—(1) This Part does not apply to resulting or constructive trusts.

Application of Part III

(2) Notwithstanding the terms of the trust instrument, section 18 and sections 27 to 32 prevail over them.

Mandatory application ss. 18, 27-32

Application of s. 18

(3) Section 18 applies only to trusts that take effect after this Act comes into force.

Application of ss. 27-32

(4) Except for an express vesting declaration having effect only as set out in section 9 of the predecessor of this Act, sections 27 to 32 apply only to deeds of appointment and deeds of discharge executed after this Act comes into force. *New.*

Limitation on number of trustees

18.—(1) Except with the consent of the Court, no trust shall have more than four trustees at any one time.

Idem

(2) Where more than four persons are originally named as trustees, the first four named who are able and willing to act shall alone be the trustees, and the other persons named shall not be trustees unless appointed on the occurrence of a vacancy or with the consent of the Court. *New.*

Appointment of substitute trustees

19.—(1) Where,

(*a*) a trustee,

  (i) dies,

  (ii) expresses in writing a desire to be discharged from the trust or a part of the trust,

  (iii) refuses to act as trustee,

  (iv) is a mentally incompetent person,

  (v) has been convicted of an indictable offence,

  (vi) is bankrupt;

(*b*) a person appointed a trustee disclaims the trust in writing; or

(*c*) a corporate trustee is dissolved or is in liquidation,

the one or more persons nominated by the trust instrument for the purpose of appointing substitute or additional trustees, or if there is no such person or if there is no such person able and willing to act, then the one or more surviving or continuing trustees, or the personal representatives of the last surviving or continuing trustee, may, subject to section 18, by deed appoint one or more persons, including one or more of the persons exercising the power, to be a trustee or trustees in the place of the first-mentioned trustee. R.S.O. 1980, c. 512, s. 3(1), *amended*.

Appointment of new trustees where trustee removed under a power in the trust instrument

(2) Where a trustee has been removed under a power conferred by a trust instrument, then, subject to the terms of a power of replacement in the trust instrument and to section 18, one or more substitute trustees may be appointed in the place of the removed trustee as if he had died or, in the case of a corporate trustee, as if it had expressed in writing a desire to be discharged from the trust.

Powers of persons nominated to appoint new trustees

(3) Where a person is nominated in a trust instrument for the purpose of appointing substitute or additional trustees,

(*a*) he shall be deemed to be nominated for the purpose of appointing substitute trustees in any of the circumstances set forth in subsection (1); and

(*b*) the fact that the circumstances, if any, set forth in the trust instrument which empower the person therein nominated to act in the appointment of substitute trustees do not include all or any of the circumstances set forth in subsection (1) does not itself constitute a contrary intent on the part of the person creating the trust that subsection (1) is not to apply.

Joint nominees

(4) Where two or more persons are nominated jointly in a trust instrument for the purpose of appointing substitute or additional trustees and they cannot agree in naming an appointee, they shall be deemed to be unable to act.

Appointment under the instrument and under sub. (1)

(5) Where a person nominated in a trust instrument for the purpose of appointing substitute or additional trustees is empowered to make an appointment both under the trust instrument and under subsection (1), any appointment made by him shall be deemed to have been made under the trust instrument and subject to its terms.

Surviving or continuing trustees

(6) For the purpose of subsection (1), a surviving or continuing trustee includes a sole trustee and also a trustee, whether or not he is the sole trustee, who expresses in writing a desire to be discharged from all or any of the trusts or powers reposed in or conferred upon him, but does not include a trustee who is to be involuntarily replaced, or any person appointed a trustee who predeceases the taking effect of the trust or who, whenever appointed, in writing disclaims the trust, or who, having neither disclaimed nor resigned, refuses to act as trustee.

Powers of appointment by personal representatives

(7) The power conferred by subsection (1) upon the personal representatives of a last surviving or continuing trustee is exercisable by the executors for the time being of the last surviving or continuing trustee who have proved the will of the testator, or by the administrators for the time being of such trustee, without the

concurrence of an executor who has renounced or has not proved. *New*.

Power of surviving trustee to appoint by will

20. Subject to section 18, the sole trustee, or the last surviving or continuing trustee, within the meaning of subsection 19(6), may appoint by will one or more persons to act as a trustee or trustees in his place after his death. R.S.O. 1980, c. 512, s. 4.

Appointment of additional trustees

21. The one or more persons nominated by the trust instrument for the purpose of appointing substitute or additional trustees, or, if there is no such person or if there is no such person able and willing to act, then the trustee or trustees, other than a person appointed a trustee who in writing disclaims the trust, or who, having neither disclaimed nor resigned, refuses to act as trustee may, subject to section 18, by deed appoint one or more persons, including himself in the case of a person nominated for the purpose of appointing trustees, to be an additional trustee or trustees, but it is not necessary to appoint an additional trustee unless the trust instrument or an Act so requires. *New*.

Separate trustees for separate parts of the trust property

22. Where it would assist in the administration of the whole or any part of a trust or where it would benefit beneficiaries of a trust, one or more separate trustees may be appointed, whether any such person or persons be an original, substitute or additional trustee or trustees, for any part of the trust property held on trusts distinct from those relating to any other part, but a separate sole trustee may be appointed in those circumstances only where a sole trustee was originally appointed, and for each separately administered part the limitation upon the number of trustees specified in subsection 18(1) applies. *New*.

Minimum number of trustees

23. It is not necessary for more than one trustee to be appointed by way of substitution where only one trustee was originally appointed, but, except where only one trustee was originally appointed and subject to subsection 57(1), a non-corporate trustee shall not act alone, and a trustee is not to be discharged unless there will be either a trust company or two or more individuals to act as trustees. *New*.

Powers of new trustees

24. Every substitute or additional trustee appointed pursuant to this Act, both before and after the trust property becomes vested in him, has the same powers, authorities and discretions and may in all respects act as if he had been originally appointed a trustee by the trust instrument. *New*.

Discharge of trustee without a new appointment

25.—(1) Where a trustee declares in writing that he desires to be discharged from the trust or a part of the trust and if after his discharge there will be either a trust company or two or more individuals to act as trustees in his place, then, if his co-trustees and such other person, if any, as is empowered to appoint trustees, consent by deed to his discharge and to the vesting of the trust property in his co-trustees alone, he shall be deemed to have retired from the trust and is discharged therefrom without any new trustee being appointed in his place. R.S.O. 1980, c. 512, s. 2, *amended*.

Right of trustees to retire

(2) A trust instrument must not withhold from a trustee the right to retire from the trust or a part of the trust and must not make the requirements for retirement more onerous than are provided in subsection (1), and any such provisions are invalid for all purposes. *New*.

Removal of trustees

(3) Where a trustee refuses to act as trustee, is a mentally incompetent person, has been convicted of an indictable offence, is bankrupt, or where a person appointed a trustee disclaims the trust in writing, or where a corporate trustee is dissolved or is in liquidation, and does not voluntarily retire from the trust, his co-trustees may by deed declare the trustee to be removed from the trust, if a trust company or two or more individuals to act as trustees to perform the trust will then remain, and the trustee is thereby discharged without any new trustee being appointed in his place. *New*.

Liability of trustees on discharge

26. Unless the Court orders otherwise, the retirement, removal or replacement of a trustee and any consequential vesting order, declaration or conveyance, does not discharge any person from liability for his own acts or omissions or for the acts or omissions of any former or continuing trustee. R.S.O. 1980, c. 512, s. 5(2), *amended*.

Effect of deed of appointment or of discharge for purchasers

27.—(1) Except as provided in subsection (2), a deed of appointment or a deed of discharge of a trustee, whether pursuant to this Act or the trust instrument, is conclusive evidence of the validity of the appointment or discharge in favour of a purchaser of trust property.

Actual notice

(2) A purchaser of trust property who at the time of the purchase has actual notice that an improper act or omission has occurred in the appointment or discharge of a trustee is not entitled to rely upon the validity of the deed of appointment or the deed of discharge unless title to the trust property has been held by a purchaser without actual notice of the improper act or omission.

Application of sub. (1)

(3) Subsection (1) applies to,

(*a*) a donee of property which, though originally trust property, has had the title held by a purchaser without actual notice of any impropriety referred to in subsection (2); and

(*b*) a subsequent purchaser who purported to act as a trustee in the original transfer of trust property, except that such a purchaser does not take valid title from a purchaser without actual notice of any impropriety referred to in subsection (2).

Idem

(4) Any official, including the Director of Titles, a land registrar, and any other person registering or certifying instruments or titles, who makes an entry in a book or other record in reliance upon an instrument described in subsection (1), or upon a vesting declaration, express or implied, consequent upon an appointment or discharge of a trustee shall be deemed to be a purchaser within the meaning of subsection (1).

Actual notice

(5) For the purposes of the application of subsection (2) to an official or other person within the meaning of subsection (4), actual notice is not established by the mere fact that the trust instrument or a part thereof or a copy thereof is attached to or otherwise accompanies the deed of appointment or the deed of discharge, or an express vesting declaration is contained in the deed of appointment or the deed of discharge. *New*.

Vesting of trust property by way of vesting declaration

28.—(1) A deed by which one or more substitute or additional trustees are appointed, or by which a trustee is discharged without another trustee being appointed, may contain an express declaration that the trust property vests in the one or more trustees who shall perform the trust as of the date of the instrument or such other date as is stated in the instrument for that purpose. R.S.O. 1980, c. 512, s. 9(1), (2), *amended*.

Implied declaration

(2) Where a deed within the meaning of subsection (1) does not contain an express declaration, a declaration that the trust property vests in the one or more trustees who shall perform the trust is implied therein as of the date of the instrument. *New*.

Interpretation for registration purposes

(3) For the purposes of an entry in a book or other record under subsection 27(4), the person or persons making the declaration shall be deemed to be the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act. R.S.O. 1980, c. 512, s. 9(4).

Effect of vesting declaration

29.—(1) Subject to subsections (5) to (8), a vesting declaration, express or implied, under section 28 takes effect,

(*a*) as to all trust property, notwithstanding that any estate, interest or right forming the whole or part of the trust property is not expressly referred to in the instrument; and

(*b*) as if the estate, interest or right in the property had been actually conveyed or transferred by deed or otherwise, for the same estate, interest or right, to the one or more persons in whom the trust property is declared, expressly or impliedly, to be vested or, in the case of a chose in action, as if it had been actually assigned to the last-mentioned person or persons.

Idem

(2) Except as provided in subsection (3), a vesting declaration, express or implied, consequent upon any appointment or discharge

of a trustee, is conclusive evidence of the validity of vesting of trust property in favour of a purchaser of trust property.

(3) A purchaser of trust property who at the time of the purchase has actual notice that an improper act or omission has occurred in the vesting of the trust property is not entitled to rely upon the validity of the vesting declaration unless title to the trust property has been held by a purchaser without actual notice of the improper act or omission.

Actual notice

(4) For the purposes of subsection (2), subsections 27(3), (4) and (5) apply *mutatis mutandis*.

Subs. 27(3), (4), (5) apply

(5) Where an estate, interest or right in the trust property can only be transferred by a registration or recording in a book or similar record, the vesting declaration, express or implied, prior to the registration or recording confers such rights upon the person so vested as he would have in equity, it being the duty of such person to apply for the required registration or recording.

Exception

(6) Where the estate, interest or right in the property takes the form of a chose in action, a vesting declaration, express or implied, is an absolute assignment within the meaning of section 53 of the *Conveyancing and Law of Property Act*, and until express notice in writing is given by the newly vested persons to the debtor or other person obligated under the chose in action, the vesting declaration has effect only as an assignment in equity from the formerly vested persons to the newly vested persons.

Choses in action

R.S.O. 1980, c. 90

(7) It is the duty of both the formerly vested persons and the newly vested persons to ensure that the trust property is actually delivered to the newly vested persons, but where inspection, cancellation or endorsement is required by any registering authority and the property cannot be produced the newly vested persons may apply for registration or recording in the same manner and subject to the same terms and conditions as if the property had been lost.

Duty to deliver

(8) Where actual delivery of trust property has not taken place but transfer has occurred by operation of subsection (1), the right of security or other personal interest of any person in that property is not destroyed by reason only of the operation of subsection (1).

Rights of security protected

(9) Where leasehold property is subject to a trust, the vesting of the property in one or more substitute or additional trustees pursuant to a vesting declaration, express or implied, is not a breach of any covenant or condition against assignment, subletting or parting with possession of the property, whether absolute or with consent, made by one or more former trustees and, notwithstanding any term in the lease to the contrary, does not give rise to any forfeiture, right of re-entry or other claim for breach of such covenant or condition. *New*.

Leaseholds

Protection of persons dealing with trustees

30.—(1) Except as provided in subsection (2), a purchaser of trust property who relies upon the production or registration of a deed of appointment or a deed of discharge that contains a vesting declaration, express or implied, pursuant to section 28, whether or not he otherwise has notice of the trust, may assume without inquiry that the former trustees and the substitute or additional trustees possessed or possess and properly exercised or are properly exercising every power which they purported or purport to exercise over the trust property.

Actual notice

(2) A purchaser of trust property who at the time of the purchase has actual notice that the trustees do not possess the power they purport to exercise, or that they are exercising a power improperly, takes the trust property subject to the terms of the trust unless title to the trust property has been held by a purchaser without actual notice that the trustees do not possess the power or that they are exercising the power improperly.

Subs. 27(3), (4), (5) apply

(3) For the purposes of subsection (1), subsections 27(3), (4) and (5) apply *mutatis mutandis*.

Application of ss. 27-30 to original trustees

31. Where a sole trustee or one or more trustees have been appointed by a trust instrument to act on the initial taking effect of the trust, and all or some of them have continued to act in the absence of an appointment of a substitute or additional trustee, they may by deed declare that they were appointed by the trust instrument, and the deed has effect as if it were a deed of appointment containing a vesting declaration for the purposes of sections 27 to 30.

Appointment and discharge of trustees must be by deed

32.—(1) The appointment or discharge of a trustee, whether pursuant to a power contained in this Part or the trust instrument, must be by deed.

Recitals

(2) Where the appointment or discharge of a trustee is pursuant to a power contained in the trust instrument, the deed must set out the terms of the trust instrument that authorize the act.

Validity of majority clauses in trust instrument

(3) If original, substitute or additional trustees assert to a purchaser that the trust instrument permits a majority to bind all the trustees and that they constitute a majority, the deed of appointment or the deed of discharge, or a deed within the meaning of section 31, or, in either case, a supplemental deed, must contain a recital quoting the provision of the trust instrument to that effect, and, subject to subsection (4), the recital is conclusive evidence of the facts so stated and shall operate to bind the trust in favour of a purchaser of trust property.

Actual notice

(4) A purchaser of trust property who at the time of the purchase has actual notice that the trust instrument does not permit a majority to bind all the trustees or that the trustees referred to in subsection (3) do not constitute a majority is not entitled to rely upon the

conclusive effect of the recital unless title to the trust property has been held by a purchaser without such actual notice.

Failure to comply

(5) Where the appointment or discharge of a trustee does not comply with this section, the appointment or discharge is invalid for all purposes. *New*.

Right of action of removed trustee

33. Where a trustee establishes before the Court that the alleged circumstances on the basis of which he was removed as trustee did not in fact exist, he may claim an appropriate award of damages for the wrongful removal against the persons who caused his removal. *New*.

PART IV

INVESTMENT AND ADMINISTRATIVE POWERS OF TRUSTEES

Powers of investment

34.—(1) Subject to section 4, trustees may invest trust money in any kind of property. R.S.O. 1980, c. 512, ss. 26, 27, *amended*.

Guidelines for investments

(2) In investing trust money under subsection (1), among the matters which it is appropriate for trustees to consider are the following:

1. The marketability of the investment.
2. The length of the term of the investment, including its maturity date, callability and redeemability.
3. The probable duration of the trust.
4. The probable condition of the market with respect to the value of the investment at the termination of the trust, especially if at the termination of the trust the investment must be converted into money for the purpose of distribution.
5. The probable condition of the market with respect to reinvestment at the time when the investment matures.
6. The aggregate value of the trust estate and the nature of the other investments.
7. The effect of the investment in increasing and diminishing liability for taxes.
8. The likelihood of inflation.

Idem

(3) Nothing in subsection (2) imposes an obligation upon trustees to consider each of the matters mentioned in that subsection before deciding upon any investment.

Meaning of expressions for sub. (1)

(4) The expressions "legal investment", "authorized investment", "investment authorized by law" or words of similar import as used in a trust instrument shall be taken to mean any investment that is authorized by subsection (1). *New.*

Ancillary powers of trustees

35. Subject to section 4, trustees may,

(*a*) pending investment, or for the purposes of paying the ongoing expenses of the trust, deposit trust money in a chartered bank, trust company or any other depository empowered by law to accept moneys for deposit; R.S.O. 1980, c. 512, s. 28, *amended.*

(*b*) sell trust property by public auction or private contract for cash or credit on appropriate security;

(*c*) dispose of trust property by way of exchange for other property, or where the trust property consists of an undivided share, concur in the partition of the property in which the share is held;

(*d*) as lessees, renew a lease held by the trust;

(*e*) as lessors, grant or renew a lease or sublease of trust property for a term not exceeding

(i) in the case of residential property, three years, or

(ii) in the case of any other type of property, seven years,

or with the consent of the Court, grant or renew a lease or sublease of trust property for longer periods or grant an option to renew the lease or sublease or to purchase the reversion;

(*f*) manage, maintain, repair, renovate, improve or develop trust property, including in the case of land subdividing, erecting buildings, dedicating for any public purpose, granting easements, *profits à pendre* or licences, and entering into agreements with respect to boundaries, party walls, fencing or other matters in connection with trust property;

(*g*) insure against loss or damage to trust property and against any other risk or liability;

(*h*) carry on any business, whether as sole proprietor, partner, limited partner or otherwise, incorporate or otherwise change the form of the business, and dispose of or wind up the business;

(*i*) exercise all rights and powers and satisfy all liabilities incidental to the ownership of shares or obligations of a corporation, including power to sell or exercise subscription rights, to exchange the shares or obligations for other shares or obligations, to join in plans for reconstruction, reorganization or amalgamation, to enter into pooling or other agreements, or to authorize the sale of the assets or undertaking of the corporation;

(*j*) surrender insurance policies, leases or other property subject to onerous obligations of such a nature that it would not be in the interests of the beneficiaries to retain the trust property;

(*k*) purchase or rent a living accommodation or construct a house on land held by them for the purpose of providing a home for the person entitled to the income of the money expended in respect of the purchase, or to the income to be expended in respect of the rent, or to the income of either the land or the money expended in respect of the purchase or construction, if in any case under this clause, the person for whom the living accommodation is provided consents thereto;

(*l*) borrow money and, as security, mortgage, pledge or otherwise charge any of the trust property;

(*m*) pay or assert or contest any claim, and compromise, compound, abandon, submit to arbitration or otherwise settle any debt, account, claim or thing relating to the trust or the trust property;

(*n*) give a receipt in writing for any money or other property received;

(*o*) pay out of trust money any taxes, assessments, charges, premiums or other outgoings in respect of trust property;

(*p*) reimburse themselves or pay or discharge out of trust property all expenses incurred in or about the administration of the trust;

(*q*) appropriate with the consent of the beneficiary property *in specie* in or towards satisfaction of the share or interest of the beneficiary, and for such purpose, following consultation with a qualified person where the trustees are not personally qualified, place a valuation on the property so appropriated, except that no specific gift made by the trust instrument shall be adversely affected by the appropriation and that within one month of the valuation, or such longer time as the Court authorizes, the trustees, beneficiaries or any other interested person may apply to the Court for a review of the appropriation or the valuation, and, following such notice as the Court may order, the Court may confirm or make such variation as the Court considers proper; and

(*r*) do all supplementary or ancillary acts or things and execute all instruments necessary or desirable to enable them to carry out effectively the intent and purpose of the powers vested in them. *New*.

Passing of accounts

36.—(1) Trustees, whether of an *inter vivos* or testamentary trust, may pass their accounts voluntarily or they may be called upon by citation to do so on the application of any person interested therein. R.R.O. 1980, Reg. 925, r. 59, *amended*.

Idem

(2) Trustees desiring to pass the accounts of their dealings with the trust property may file their accounts in the office of any court having jurisdiction, and the proceedings and practice upon the passing of such accounts shall be the same and have the like effect as the passing of the accounts of executors or administrators, except that in the case of trustees under a will, the accounts shall be filed and passed in the office of the court by which probate of the will was granted. R.S.O. 1980, c. 512, s. 23(1), *amended*.

Disposition of insurance proceeds

37.—(1) Where a contract of insurance has been entered into and any premiums have been paid by the trustees, the money receivable by the trustees under the policy shall be held by them as capital money of the trust, subject to the terms of the trust, including the power of investment.

Idem

(2) All or part of the money so held may be applied by the trustees, with the consent of the Court, for rebuilding, reinstating, replacing or the major repair of trust property that has been lost or damaged.

Idem

(3) Where a beneficiary of a trust enters into a contract of insurance against loss of, or damage to, any trust property, or any other risk or liability to which the trustees are or might be exposed, whether or not the beneficiary is required by the trust instrument or by a third party so to do,

(*a*) the money received under the policy shall be held as capital money and assigned by the insured to the trustees; and

(*b*) in the event that money is received under the policy, the insured shall be reimbursed by the trustees for the amount of such premium payment or payments as the trustees in their discretion consider reflects the interests of beneficiaries other than the insured in the trust property.

Rights of mortgagees etc. not affected

(4) Nothing in this section affects the rights of a mortgagee, lessor, lessee or other person in money so received from an insurer.

Application of section

(5) This section applies only to money received by trustees after this Act comes into force. *New*.

Discharge of persons paying trustees

38. A receipt under clause 35(*n*) for any money or other property received by trustees is a sufficient discharge to the person paying or transferring the money or other property and exonerates him from seeing to its application or being answerable for its misapplication. *New*.

Duty to act impartially

39.—(1) Trustees shall act impartially as between income and capital beneficiaries, having regard to each item of trust property, whatever the nature of the property, and whether it is an original asset or an asset acquired subsequently, further to an authorization in the trust instrument or conferred by statute.

Application of section

(2) Notwithstanding section 2 and except where the trust instrument expressly provides otherwise, this section applies to every trust. *New*.

Apportionment of outgoings between income and capital beneficiaries

40.—(1) Trustees may apportion any payment or expenditure for any outgoing between the income and capital accounts, or they may charge the payment or expenditure exclusively to either income or capital as they consider just and equitable in all the circumstances.

Payment and recoupment of outgoings

(2) Trustees may pay for any outgoing from income or capital, or wholly or partly from each, as appears to them to be in accord with sound business practice and in the best interests of the trust beneficiaries as a whole, and, where the whole or part of the payment or expenditure is made out of or charged to capital, they may recoup capital from subsequent income, or where the whole or part of the payment or expenditure is made out of or charged to income, they may recoup income from capital, if, in either case, they consider that course to be just and equitable in all the circumstances.

Deductions for depreciation and obsolescence

(3) Trustees may, and if ordered by the Court upon application shall, deduct from the income derived from trust property that is subject to depreciation or obsolescence such amounts as are fair and reasonable having regard to sound business practice in order to protect the capital of the trust from loss, and any sums so deducted shall be set aside and added to the capital of the trust so as to become capital for all purposes.

Exception of spousal trusts

S.C. 1970-71-72, c. 63

(4) Where a trust is a trust for the exclusive benefit of the spouse of the testator or settlor within the meaning of the *Income Tax Act* (Canada), this section does not apply to the trust unless the trust instrument expressly provides that it or a specified part of it does apply.

Application of section

(5) This section is subject to section 39 and applies only to trusts that take effect after this Act comes into force. *New.*

Discretionary allocation trusts of receipts and outgoings

41.—(1) Subject to section 39, where trustees are expressly directed by the trust instrument to hold trust assets on discretionary allocation trusts, they shall allocate receipts to and charges for outgoings against the income and capital accounts as they consider just and equitable in all the circumstances.

Application of subs. 40(2), (3)

(2) Where trustees are expressly directed by the trust instrument to hold trust assets on discretionary allocation trusts, subsections 40(2) and (3) apply.

Guidelines for "income" and "capital"

(3) For the purposes of this section and for determining the relative proportionate interests of beneficiaries of the trust, but not so as to limit in any way the powers conferred by subsection (1),

(*a*) income may be understood to be the return in money or property derived from the use of capital; and

(*b*) capital may be understood to be the property set aside by the trust instrument to be delivered eventually to a remainderman, while the return or use of the capital is in the meantime taken or received by or held for accumulation for an income beneficiary. *New.*

Percentage trusts: allocation of receipts and outgoings

42.—(1) Subject to section 39, where trustees are expressly directed by the trust instrument to hold trust assets on percentage trusts, they shall value the assets periodically and, instead of any income arising from the assets, pay to the person who would otherwise be the income beneficiary a percentage of that valuation in each year of the valuation period.

Idem

(2) Where there are two or more income beneficiaries whose interests are vested in possession at the same time, the percentage shall be divided equally among them, unless the trust instrument divides the percentage in another proportion, or makes other provision, including discretionary trusts, for the distribution of the percentage.

Percentage payments

(3) The percentage payment shall be made from income arising during the accounting year and, so far as income is insufficient, from capital, and any income of the trust arising during the accounting year in excess of the amount of the percentage payment shall be added to capital.

(4) In this section,

Meaning of "assets", "valuation", "valuation period"

(*a*) "assets" means the capital of the trust property subject to the percentage trusts, plus the income arising therefrom on hand, accumulated and accrued on valuation day;

(*b*) "valuation" means the fair market value of the assets less the liabilities outstanding at the moment of valuation; and

(*c*) "valuation period" means the period of time between one valuation and the next.

Frequency of valuations and determination of the percentage

(5) Where the trust instrument does not provide for the frequency of valuations or for the percentage to be paid annually during a valuation period, the Lieutenant Governor in Council may make regulations providing therefor and for such ancillary matters as he considers proper. *New*.

Application of ss. 41, 42

R.S.O. 1980, c. 5.

43.—(1) The *Accumulations Act* does not apply to the operation of section 41 or 42.

Idem

(2) A testator or settlor in employing section 41 or 42 is not precluded from conferring upon the trustees a power to encroach upon capital in favour of a beneficiary. *New*.

PART V

DISPOSITIVE POWERS OF TRUSTEES

Meaning of vested interest

44.—(1) For the purposes of sections 45 to 51, a vested interest includes an interest that is vested absolutely, defeasibly, whether in whole or in part, determinably, or deferred as to possession.

Application of ss. 45-51

S.C. 1970-71-72, c. 63

(2) Where there is a trust for the exclusive benefit of the spouse of the testator or settlor within the meaning of the *Income Tax Act* (Canada), sections 45 to 51 do not apply unless the trust instrument expressly provides otherwise.

Direction to accumulate income

(3) For the purposes of sections 45 to 51 a direction to accumulate income is not in itself evidence of a contrary intent. *New*.

Meaning of subtrust

(4) For the purposes of subsections 45(2) and 50(1), "subtrust" means a new and separate trust to which trust property is transferred in accordance with the terms of a trust or the law for the benefit of a beneficiary and any one or more persons authorized by the trust or the law.

Power to apply income for maintenance or advancement

R.S.O. 1980, c. 374

45.—(1) Where property is held by trustees in trust for a person, for any interest, whether vested or contingent, then, notwithstanding that the interest may ultimately prove to be invalid under the *Perpetuities Act*, but subject to any interests or charges affecting that property, (*a*) during the minority of such person, if his interest so long continues, the trustees may, at their sole discretion, pay to his parent or guardian or to the person having his custody or control, or otherwise apply for or towards his maintenance, education, advancement in life or benefit, the whole or such part of the income of that property as may, in the circumstances, be reasonable, whether or not there is

(i) any other fund applicable to the same purpose, or

(ii) any person bound by law to provide for his maintenance or education; and

(*b*) in the case of any such person who has attained the age of eighteen years and has not an income or capital interest vested in interest and in possession, the trustees may, until he either attains such an interest or dies or until failure of his interest, pay to that person for his benefit the whole or any part of the income as they in their sole discretion think fit, whether or not there is any other fund available for payments to him.

Idem

(2) Where the person qualified for discretionary payments under clause (1)(*b*) is or has been married, the trustees may exercise their power under that clause, by way of a subtrust or otherwise, in favour of the existing or former husband or wife or the children of the person so qualified, including the children of a former marriage, if in the sole discretion of the trustees they consider the circumstances appropriate and to the benefit of the person so qualified. *New*.

Accumulated income

46.—(1) Notwithstanding any rule of law of perpetuities or accumulations, during the minority of a person to whom section 45 applies, if his interest so long continues, and for the period during which the trustees are empowered by clause 45(1)(*b*) to make payments, the trustees shall accumulate the residue of the income in the way of compound interest by investing the residue and the resulting income thereof from time to time in investments authorized by law or the trust instrument, and shall pay those accumulations to the person whose interest qualifies him for discretionary payments under subsection 45(1), payment being made when such person attains the age of eighteen years, or, if he does not at the age of eighteen years have or acquire an interest which is vested in interest and in possession, then when he does so acquire such an interest.

Idem

(2) If such person has an interest in income or capital that is vested in interest, and prior to any defeasance or determination occurring he dies, whether or not death causes defeasance or determination, the accumulations to that date pass to his personal representatives, but a person who has an interest in capital vested in interest is not entitled to call for the capital or the accumulations during his lifetime other than at the close of his minority or when his interest vests in possession, whichever occurs last.

(3) If such person has a contingent interest in income or capital, and before any contingency occurs he dies or the interest fails, the accumulations shall be held as an accretion to the capital of the trust property and as one fund with such capital for all purposes. Idem

(4) The entitlement of a person to call for the accumulations under this section is without prejudice to any provisions with respect thereto contained in any settlement made by him at an earlier time and subsisting when the entitlement occurs. Idem

(5) At any time during the minority of such person, if his interest so long continues, and during the period trustees are empowered by clause 45(1)(*b*) to make payments to him or for his benefit, the trustees may pay or apply the accumulated income or any part of it as if the accumulations were income arising in the then current year. Idem

(6) Trustees acting under clause 45(1)(*a*) may pay or apply income or accumulations for the past maintenance, education, advancement in life, or benefit of the person who is a minor, and under clause 45(1)(*b*) or subsection 45(2) may pay accumulations as they think fit. *New*. Idem

Interests that carry intermediate income

47.-(1) Notwithstanding the terms of the trust instrument and except so far as such income or a part of it is expressly disposed of otherwise, all vested and contingent interests, whether arising by will or otherwise and whatever the nature of the property subject to them, carry the intermediate income from the date the interest arises.

Extended application of section

(2) This section extends to a vested annuity in the same manner as if the annuity were the income of property held by trustees in trust to pay the income of it to the annuitant for the same period for which the annuity is payable, and any accumulations made during the minority of the annuitant or any later period of time shall be held in trust for the annuitant absolutely. *New*.

Application of ss. 45, 46, 47

48. Sections 45, 46 and 47 apply only where the trust instrument under which the interest arises takes effect after this Act comes into force. *New*.

Power to apply capital for maintenance or advancement

R.S.O. 1980, c. 374

49.—(1) Where property is held by trustees in trust for a person for any interest in capital, whether vested or contingent, and whether the interest is in possession or in remainder or reversion, then, notwithstanding that the interest may ultimately prove to be invalid under the *Perpetuities Act*, the trustees may, subject to subsections (2) and (3),

(*a*) pay or apply the capital or part of it;

(*b*) with a view to such payment or application, sell, mortgage or charge any capital asset; or

(*c*) transfer any capital assets,

for maintenance, education, including past maintenance or education, advancement in life, or benefit of such person, if a minor, or for any purpose which is to his benefit, if an adult, as the trustees in their sole discretion think fit.

Monetary restriction

(2) The trustees may pay, transfer or apply to or for a person entitled under subsection (1) a sum not exceeding $10,000, or one-half the value of the interest of such person, whichever is the greater.

Consent of Court

(3) The trustees must obtain the consent of the Court before paying, transferring or applying any sum greater than that mentioned under subsection (2).

Availability of capital

(4) No capital shall be paid, transferred or applied under subsection (1) or (2) unless the income or accumulated surplus income is not available under the terms of the trust instrument for the maintenance, education, advancement in life or benefit of the beneficiary, or the income or accumulated surplus income so available is insufficient or exhausted. *New*.

Payment of capital other than to beneficiary

50.—(1) When the person qualified for discretionary payments under subsection 49(1) is or has been married, the trustees may exercise their power under that subsection, by way of a subtrust or otherwise, in favour of the existing or former husband or wife or the children of the person so qualified, including the children of a former marriage, if in the sole discretion of the trustees they consider the circumstances appropriate and to the benefit of the person so qualified.

Accountability of advanced funds

(2) When the person so qualified or any other person is or becomes absolutely and indefeasibly entitled to the share in the trust capital, in which the person qualified had a vested or contingent interest when the money or asset was so paid, transferred or applied, that money or asset shall be brought into account as part of that share of the trust capital.

Effect of prior life or other interest

(3) No such payment, transfer or application shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money or asset paid, transferred or applied, unless that person is in existence and of full age and consents in writing to the payment, transfer or application, or unless the Court, on the application of the trustees, so orders. *New*.

Power to impose conditions

51.—(1) Where a power to pay, transfer or apply property for any of the purposes set out in subsection 49(1) is vested in trustees by that subsection or by the trust instrument, the trustees when exercising the power have, and shall be deemed always to have had, authority to impose on the person receiving such payment any condition, whether as to repayment, payment of interest, giving security, or otherwise, and at any time after imposing such a condition, the trustees may either wholly or in part waive the condition or release any obligation undertaken or any security given by reason of the condition.

Repayment of funds advanced

(2) In determining the amount or value of the property which trustees who have imposed such a condition may pay, transfer or apply in exercise of the power, any money or asset repaid or retransferred to the trustees or recovered by them shall be deemed not to have been so paid, transferred or applied by the trustees.

Investment restrictions not applicable

R.S.O. 1980, c. 5

(3) When imposing a condition as to security under subsection (1), trustees shall not be affected by any restrictions upon the investment of the trust funds, whether imposed by the *Accumulations Act* or by the trust instrument.

No obligation to impose conditions

(4) Nothing in this section imposes upon trustees any obligation to impose such a condition.

Trustees not liable for loss

(5) Trustees are not liable for any loss incurred in respect of any asset transferred or applied under this section, including loss which arises because of the failure of a person who is subject to a condition to discharge the obligation imposed by the condition. *New.*

Claims by creditors against property held on protective trusts

52.—(1) Where property is held on trust for a person, in this section called "the protected beneficiary", for an interest that is determinable on a claim being made by a creditor or trustee in bankruptcy against the income payable to the protected beneficiary, such a claimant may apply to the Court for payment of his claim, and the Court may order the payment of the claim out of income arising from the trust until the interest but for the determinability would have terminated.

Release of capital

(2) If it is established to the satisfaction of the Court that any successive beneficiary, including any beneficiary of a discretionary trust, as to the income or capital of the trust, has derived any benefit from any debt incurred by the protected beneficiary, payment of which is being sought by the creditor, the Court may order that the whole or part of the capital of the trust be released from the trust to meet, in whole or in part, the claim of the creditor or trustee in bankruptcy of the protected beneficiary.

Income to provide reasonable maintenance

(3) On an application under this section, the Court may allow the protected beneficiary to receive, whether or not at the further discretion of the trustees, such income as in the opinion of the Court will provide reasonable maintenance for the beneficiary and his dependants.

Application of section

(4) This section applies notwithstanding the terms of the trust instrument. *New.*

PART VI

PROTECTION OF TRUSTEES AND LIABILITY OF CO-TRUSTEES BETWEEN THEMSELVES

No notice from other trust etc.

53. A trustee acting,

(*a*) for more than one trust; or

(*b*) as a personal representative of an estate,

is not, in the absence of fraud, affected by notice of any instrument, matter, fact or thing in relation to any particular trust if he has obtained notice thereof merely by reason of his acting or having acted for the purposes of another trust or estate. *New.*

Contribution and indemnity

54.—(1) Subject to any express limitation of liability in the trust instrument or to any express provision in the trust instrument as to contribution or indemnity, the proportions in which co-trustees in breach of trust are liable as between themselves for making good the loss to the trust or the amount of contribution which may be recovered by a trustee from any co-trustee are such as may be found by the Court to be just and equitable having regard to the extent of the responsibility of each trustee in breach for the loss caused.

Power of Court to exempt from contribution

(2) The Court may exempt a trustee from liability to make contribution or may order that any contribution due to or to be recovered from a trustee amounts to a complete indemnity.

Meaning of "breach of trust"

(3) In subsection (1) "breach of trust" includes any act or omission, whether intentional or negligent, giving rise to liability of a trustee to the trust beneficiaries.

Powers of Court

(4) The powers conferred on the Court by this section may be exercised even where both the trustee claiming contribution and the trustee against whom the claim is made have acted fraudulently in breach of trust.

Idem

(5) Where a trustee in breach of trust is insolvent, the Court may apportion the cost of making good the loss to the trust and any further damages as is appropriate among the solvent co-trustees.

Idem

(6) Where the beneficiaries have settled with a trustee in breach of trust and that trustee subsequently seeks contribution from a co-trustee, the Court in making any contribution order may determine whether the settlement figure is reasonable.

Co-trustees

(7) Except as otherwise provided in this section, a trustee shall not be obligated or required by the Court to make contribution to or indemnify a co-trustee.

Application of section

(8) This section does not apply in proceedings for breach of trust commenced before this Act comes into force.

Idem

(9) Nothing in this section affects any judicial determination as to liabilities for contribution and indemnity when that determination was made before this Act comes into force. *New*.

Beneficiaries instigating etc. breaches of trust

55. Where trustees commit a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the Court may impound all or any part of the interest of the beneficiary in the trust estate by way of contribution or indemnity to the trustees or persons claiming through them. R.S.O. 1980, c. 512, s. 34(1), *amended*.

PART VII

FURTHER POWERS OF THE COURT

Power of Court to remove trustees and to appoint new trustees

56.—(1) Where it appears to the Court to be in the best interests of a trust and where the removal or appointment of one or more trustees otherwise than under this section would be inexpedient, difficult or impracticable, the Court may, notwithstanding the provisions of Part III,

(*a*) remove one or more of the trustees, with or without the appointment of substitute trustees; or

(*b*) appoint one or more trustees where there is no existing trustee or uncertainty as to the existence or identity of any trustee or in substitution for or in addition to one or more existing trustees. R.S.O. 1980, c. 512, s. 5(1) *amended*.

Ss. 24, 26 apply

(2) In the event of the Court exercising its powers under this section, sections 24 and 26 apply. R.S.O. 1980, c. 512, s. 5(2), *amended*.

Power of Court to allow sole continuing trustee to act alone

57.—(1) Where two or more trustees were originally appointed and, however it occurs, there is only one trustee, not being a trust company, remaining in office, whether that person is an original or a subsequent appointee, the Court may consent to that person continuing to act as sole trustee.

S. 26 applies

(2) In the event of the Court exercising its power under subsection (1), section 26 applies to the continuing trustee. *New*.

Vesting orders

58.—(1) Where it appears to the Court to be in the best interests of a trust, the Court, subject to subsection (2), may upon application vest the trust property or an interest therein in one or more persons in such manner, for such estate or interest and on such terms as the Court orders.

Idem

(2) Where an order under subsection (1) is consequential on the appointment of one or more new trustees or on the retirement or removal of a trustee without the appointment of a new trustee in place of the trustee retiring or removed, the Court shall vest the trust property in the person or persons who, on the appointment,

retirement or removal, are the trustees. R.S.O. 1980, c. 512, ss. 10, 13, *amended*.

Appointing in lieu of vesting

(3) Where this Act provides for the making of a vesting order, the Court may, in lieu thereof, appoint a person to make or to join in making the transfer of the trust property. R.S.O. 1980, c. 512, s. 13(4), *amended*.

Vesting when trustee unable to act by incapacity or absence

59.—(1) Where,

(*a*) a trustee is under a disability that temporarily precludes his participation in the administration of the trust; or

(*b*) a trustee is, by reason of temporary absence, unable to participate in the administration of the trust,

and it appears to the one or more other trustees that it is desirable to proceed immediately to deal with the whole or a part of the trust property, and the circumstances, in the opinion of the Court, do not justify the removal of the trustee who is under the disability or who is absent, the Court may vest the whole or such part of the trust property in the trustee or trustees, other than the trustee who is under the disability or is absent, in such manner, for such estate or interest and on such terms as the Court orders.

Idem

(2) Where an order is made under subsection (1), persons acquiring any trust property vested in the remaining trustees by such order acquire the title thereto that they would have acquired if the trustee under disability or absent had been *sui juris* and had executed and joined in the delivery to them of the conveyance, transfer or assignment of the trust property, or had joined in the delivery to them of the trust property, as the case may be.

Idem

(3) A dealing with trust property vested in remaining trustees by an order made under subsection (1) is not a breach of trust merely because the trustee under disability or absent did not join or concur in the dealing.

Revesting orders

(4) On the cessation of the disability or absence of such a trustee, the Court may make an order revesting the trust property, or such of it as remains subject to the trust, and any property received in exchange for it, in all of the trustees. *New*.

Effect of vesting orders

60. A vesting order made under this Act has the same effect as if the legal or other estate or interest in the property had been actually conveyed by deed or otherwise for the same estate or interest to the person in whom the property is ordered to be vested or, in the case of a chose in action, as if it had been actually assigned to the last-mentioned person. R.S.O. 1980, c. 223, s. 79, *amended*.

Protection of persons dealing with trustees

61.—(1) A person who receives notice of the existence of a trust affecting property by reason only of the production or registration of (*a*) an order of the Court appointing or discharging trustees; or

(*b*) a vesting order made pursuant to this Act,

may assume without inquiry that the persons who before or after the making of the order were or are the trustees possessed or possess and properly exercised or are properly exercising every power which they purported or purport to exercise over the trust property.

Actual notice

(2) A purchaser of trust property who at the time of the purchase has actual notice that the persons who were or are the trustees did not or do not possess or did not or are not properly exercising every power which they purported or purport to exercise over the trust property, takes the trust property subject to the terms of the trust, unless title to the trust property has been held by a purchaser without actual notice that the trustees did not or do not possess the power or did not or are not exercising the power improperly.

Subs. 27(3), (4), (5) apply

(3) For the purposes of subsection (1), subsections 27(3), (4) and (5) apply *mutatis mutandis*.

Application of section

(4) This section applies only to vesting orders made after this Act comes into force.

Mandatory application of section

(5) This section applies notwithstanding the terms of the trust instrument.

Leasehold property

62. Where leasehold property is subject to a trust, the vesting of the property in one or more new trustees pursuant to a vesting order is not a breach of any covenant or condition against assignment, subletting or parting with possession of the property, whether absolute or with consent, made by one or more former trustees and, notwithstanding any term in the lease to the contrary, does not give rise to any forfeiture, right of re-entry or other claim for breach of such covenant or condition. *New*.

Power of Court to confer further powers upon trustees

63.—(1) Where in the administration of trust property any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the Court expedient, but it cannot be effected because of the absence of a power for that purpose vested in the trustees by the trust instrument or by law, the Court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose on such terms and subject to such provisions and conditions as the Court thinks fit, and may direct in what manner any money authorized to be expended and the costs of any transaction are to be paid or borne as between capital and income.

Rescission or variation of order

(2) The Court may by order rescind, vary or replace any order made under subsection (1), but such a rescission, variation or re-

placement does not affect any act or thing done in reliance upon the previous order before the person doing the act or thing became aware of the application to the Court to rescind, vary or replace the previous order. *New*.

Variation and termination of trusts

64.—(1) A trust, whatever the nature of the interests created or the property involved and whether arising by will, deed or other disposition, shall not be varied or terminated before the natural ending of the trust without the approval of the Court.

Application of sub. (1)

(2) Without limiting the generality of subsection (1), the prohibition in subsection (1) applies,

(*a*) to any interest under a trust whereunder the transfer or payment of capital or income

 (i) is postponed to the attainment by the beneficiary of a stated age,

 (ii) is postponed to the occurrence of a stated day or event or the passage of a stated period,

 (iii) is to be made by instalments, or

 (iv) is subject to a discretion to be exercised during any period by executors or trustees as to the one or more persons who may be paid or receive the capital or income, or as to the time or times at which or the manner in which payments or transfers of capital or income may be made; and

(*b*) to any variation or termination of a trust

 (i) by merger,

 (ii) by consent of all the beneficiaries,

 (iii) by estoppel, or

 (iv) by a beneficiary renouncing his interest so as to cause an acceleration of remainder or reversionary interests, or to free any interest of an obligation charged upon it.

Scope of sub. (1)

(3) Subsection (1) does not apply to,

(*a*) a resulting or constructive trust;

(*b*) a general power of appointment, where the donee of the power, if he did not appoint to others, would be the sole beneficiary of the trust, except for those entitled in default of appointment; or (*c*) a trust instrument that contains a power whereby one or more persons, who are able and willing to act, may vary or terminate the trust or any of its terms.

Application of section

(4) This section applies only to trust instruments that take effect after this Act comes into force. *New*.

Approval of Court

65.—(1) Subject to subsections (2) and (3), where property is held on trust under a will, deed or other disposition, the Court may by order upon the application of any person approve any arrangement varying or terminating the whole or any part of the trust, resettling any interest under the trust, or varying or enlarging the powers of the trustees to administer any of the trust property.

Consent of capacitated beneficiaries

(2) Before an arrangement under subsection (1) is submitted to the Court for approval, the arrangement must have the consent in writing of each person, other than a person within subsection (3), who is beneficially interested in the trust.

Consent of incapacitated beneficiaries

(3) In approving an arrangement under subsection (1), the Court may consent on behalf of,

(*a*) any person who has an interest, whether vested or contingent, under the trust who by reason of minority or other incapacity is incapable of consenting;

(*b*) any person, whether ascertained or not, who may become entitled to an interest under the trust as being at a future date or on the happening of a future event a person of a specified description or a member of a specified class of persons;

(*c*) any person whose whereabouts are unknown or who is unborn; or

(*d*) any person in respect of any interest of his that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined at the date of the application to the Court.

Court must be satisfied

(4) The Court shall not approve an arrangement unless it is satisfied,

(*a*) that the carrying out of the arrangement appears to be for the benefit of each person on behalf of whom the Court may consent under subsection (3); and

(*b*) that having regard both to the intentions of the settlor or testator in creating the trust and to all the circumstances of any beneficiary not within subsection (3), the arrangement is one which ought to be approved.

Evidence

(5) A living settlor may give evidence concerning his intentions and his views on the proposed arrangement, and any evidence of the intentions of a living, but incapacitated, settlor, or of a testator, must be presented to the Court.

Court may approve new trust arrangements

(6) Where a will does not contain a trust but the Court is satisfied, having regard to the circumstances and the terms of a gift or devise, that it would benefit a minor or other incapacitated beneficiary if the Court were to approve an arrangement whereby the property or interest taken by that beneficiary under the will would be held on trusts during the period of incapacity, the Court may approve such an arrangement.

Effect of Court order

(7) An order under this section approving an arrangement has the effect of executing the variation or termination, as the case may be, so that no further act on the part of any person is necessary to carry out the variation or termination of the trust in question. *New.*

Definition for purposes of ss. 64, 65

66. A "beneficiary" or "person" within the meaning of sections 64 and 65 includes a charitable corporation or trust, but the Court shall not approve a variation or termination of a charitable trust under section 65. *New.*

Perpetuity rules for purposes of s. 65

67. For the purpose of the rules against perpetuities and accumulations, time runs from the date of the order of the Court approving an arrangement under section 65 unless the nature of the variation or of the termination of any part of any trust is such that the Court considers time should continue to run as though no variation or termination in part had occurred, and in this latter case the order must so state. *New.*

Trustees may apply for advice respecting trust property

68.—(1) Trustees may, without commencing an action, apply to the Court for its opinion, advice or direction upon any question concerning the trust, including the administration of the trust property.

Indemnity of trustee acting as advised

(2) A trustee acting upon the Court's opinion, advice or direction has discharged his duty as trustee with respect to the subject-matter of the opinion, advice or direction, unless he was guilty of fraud, wilful concealment or misrepresentation in obtaining the opinion, advice or direction. R.S.O. 1980, c. 512, s. 60, *amended.*

Relief of trustees committing technical breach of trust

69. If in any proceedings affecting a trustee or trust property it appears to the Court that a trustee or any person who may be held to be fiduciarily responsible as a trustee is or may be personally liable for a breach of trust, whenever the transaction alleged or found to be a breach of trust occurred, but has acted honestly and reasonably and ought fairly to be excused for the breach of trust and for not obtaining the directions of the Court in the matter in which he committed the breach, the Court may relieve the trustee either wholly or partly from personal liability for the breach. R.S.O. 1980, c. 512, s. 35, *amended.*

Power of Court to give judgment in absence of a trustee

70. Where in an action the Court is satisfied that a diligent search has been made to find a defendant in the action in order to serve him with a process of the Court and that he cannot be found, the Court may hear and determine the action and give judgment against that person in his character of a trustee as if he had been duly served or had entered an appearance in the action and had appeared by his counsel at the hearing, but without prejudice to any interest he may have in the matters in question in the action in any other character. *New*.

Compensation of trustees

71.—(1) Trustees are entitled to such fair and reasonable compensation for their work and time spent on the trust as a court of competent jurisdiction on application or on the passing of accounts may award. R.S.O. 1980, c. 512, s. 61(1), (3), *amended*.

Compensation for professional services

(2) Trustees who possess or because of their profession, business or calling have professional skills and have rendered necessary professional services to the trust, apart from their duties and powers as trustees, are entitled to such additional compensation for such services as a court of competent jurisdiction may award. R.S.O. 1980, c. 512, s. 61(4), *amended*.

Interim compensation of trustees

72.—(1) Subject to subsections (2) and (3), and any regulation made under section 73, trustees may, from time to time during the administration of the trust, pay to themselves or any of them from the assets of the trust such sum as in their opinion is fair and reasonable compensation for their work and time spent on the trust during the period of time to which the payment relates.

Court approval

(2) Trustees who take compensation under subsection (1) must,

(*a*) at the time of the taking give notice to the beneficiaries of the sum taken and an account of the services rendered; and

(*b*) on an application or on the passing of accounts, satisfy a court having jurisdiction that the sum taken was fair and reasonable.

Court order

(3) Where a court of competent jurisdiction determines that the sum taken as compensation under subsection (1),

(*a*) was fraudulently taken, the court shall order it to be returned to the trust, and may deny any compensation to the trustees;

(*b*) was not fair and reasonable, the court shall determine what is fair and reasonable and order the difference between the sum taken and the sum fixed by the court be returned with interest to the trust.

Costs

(4) In any application or passing of accounts under this section, a court of competent jurisdiction may make any order as to costs or otherwise as the court considers proper in the circumstances. *New*.

Regulations

73. The Lieutenant Governor in Council may make regulations,

(*a*) prescribing guidelines respecting the sums payable as compensation to trustees; and

(*b*) respecting the taking of compensation under section 72. *New*.

Payment into Court upon order

74.—(1) Where money belonging to a trust is in the hands or under the control of or is vested in one or more trustees and it is the desire of the trustees, or of the majority of the trustees, to pay the money into Court, the Court may upon application order the payment to be made.

Payment or delivery to Accountant of Court

(2) Where any such money is on deposit with a bank or other depository, the Court may order that it be paid to the Accountant of the Supreme Court, and payment made in pursuance of the order is valid and takes effect as if it had been made on the authority or by the act of all the persons entitled to the money so paid.

Payment into Court by persons holding trust money for trustees

(3) Where, due to the absence, death or other unavailability of a trustee, it is not possible to secure an acquittance of the money, any person with whom trust money has been deposited or to whose hands trust money has come may make an application similar to that authorized by subsection (1).

Moneys found to be due minor etc., on final passing of his accounts to be paid into Court

(4) Subject to subsection (8), where, on the passing of the final accounts of a trustee there is found to be in his hands money belonging to a minor, a mentally incompetent person, a person of unsound mind or a person whose address is unknown, the trustee shall pay the money into Court to the credit of the person to whom it belongs. R.S.O. 1980, c. 512, s. 36(1-5), *amended*.

Moneys to which minor or mentally incompetent person entitled

(5) Subject to subsection (8), where a minor, mentally incompetent person or person of unsound mind is entitled to money, the person by whom the money is payable, upon delivering to the Official Guardian and to the Accountant of the Supreme Court affidavits setting out,

(*a*) the facts entitling the person to the money;

(*b*) the date of the birth of the person entitled to the money if the person is a minor;

(*c*) the full name and the full postal address of the person entitled to the money; and (*d*) the full name and the full postal address of the person with whom the person entitled to the money resides,

may pay the money into Court to the credit of the minor, mentally incompetent person or person of unsound mind and such payment is a sufficient discharge for the money so paid. R.S.O. 1980, c. 512, s. 36(6).

Transfer of trust

(6) Where a trustee desires to be relieved from his trust, the Court may order all securities held for the trust to be transferred to the Public Trustee.

Disposition

(7) Money paid into Court under this Act is subject to the order of the Court.

Patients in mental hospitals

(8) Where the Public Trustee is committee of the estate of a person to whom money is due under subsection (4) or (5), the money due shall be paid to the Public Trustee. R.S.O. 1980, c. 512, s. 36 (7-9), *amended*.

PART VIII

CHARITABLE TRUSTS AND NON-CHARITABLE PURPOSE TRUSTS

Application of Part VIII

75. This Part applies only to charitable trusts and non-charitable purpose trusts. *New*.

Power of Court to vary certain trusts

76.—(1) If the Court upon application by the trustees of a charitable trust, or, in the absence of such trustees, by the personal representatives of a testamentary donor, finds,

(*a*) that an impracticability, impossibility or other difficulty has arisen, whenever it arose, that hinders or prevents the carrying out of the intention of the terms of the trust; or

(*b*) that a variation of the terms of the trust or an enlargement of the powers of the trustees would facilitate the carrying out of that intent,

the Court may amend, replace, delete or otherwise vary any term of the trust or may enlarge the powers of the trustees to administer the trust. *New*.

Irrelevance of the type of charitable intent

(2) For the purposes of a variation under subsection (1),

(*a*) it is irrelevant whether the donor had a particular or general charitable intent, except that where an instrument of gift expressly provides for a gift over or a reversion in the event of the lapse or other failure of a charitable object, the gift over or reversion, if otherwise valid, may take effect despite this clause; and (*b*) the Court shall approve or select one or more purposes as close as is practicable or reasonable to the original or previously varied purpose or purposes. *New*.

Surplus moneys from public appeals

77.—(1) Where as a result of an appeal to the public for support of any one or more objects, whether charitable or otherwise, any property is held by trustees for such object or objects, the provisions of section 76 apply *mutatis mutandis*, so long as the object when varied is exclusively charitable.

Return of donation

(2) If a donor is identifiable and if he indicated in writing at the time he made the donation that, in the event of an inability of the trustees to expend the trust property upon the one or more objects of the trust, his donation, or the unexpended portion thereof, shall be returned to him, the trustees must, before an application is made under subsection (1), return the donation, or a *pro rata* portion thereof, less a reasonable sum to meet the proper expenses of the trustees in connection with the donation. *New*.

Exercise of powers of Court in favour of charities etc.

78. For the purpose of vesting any property in the trustees of any charity the Court may exercise any of the powers conferred upon it by this Act. R.S.O. 1980, c. 512, s. 14, *amended*.

Power to order a sale

79. Where land is held by trustees for a charitable purpose and it appears that the land can be no longer advantageously used for such charitable purpose or that for any other reason the land ought to be sold, the Court may authorize its sale and give such directions in relation to the sale and for securing the due investment and application of the money arising from the sale as are appropriate. R.S.O. 1980, c. 512, s. 15(1), *amended*.

Notice to Public Trustee

80. No order shall be made under section 76, 77 or 79 unless the trustees have given notice to the Public Trustee at least one month prior to the application to the Court. R.S.O. 1980, c. 512, s. 15(2), *amended*.

Imperfect trust provisions: application to charitable purposes

81.—(1) In this section "imperfect trust provision" means a trust under which a non-charitable as well as a charitable purpose or purposes is or are included or could be construed as being included in the object or objects of the trust to or for which an application of the trust property or any part thereof is by the trust directed or allowed.

Idem

(2) A trust for both non-charitable and charitable purposes shall not be held to be invalid for the reason only that it is an imperfect trust provision.

Idem

(3) Every imperfect trust provision shall be construed and given effect to as if no application of the trust property or any part thereof to or for any non-charitable purpose had been or could be construed to have been authorized.

Application of sub. (3)

R.S.O. 1980, c. 374

(4) Where under an imperfect trust provision property is held on trust which is valid by virtue of subsection 16(1) of the *Perpetuities Act*, subsection (2) of that section does not apply to the trust, and subsection (3) of this section applies but in those circumstances and to that property only in or to which that subsection 16(2) would otherwise have applied.

Idem

(5) Where under the terms of an imperfect trust provision the trustees are expressly or impliedly directed to apply a part of the trust property to or for any non-charitable purpose, subsections (2), (3) and (4) do not apply to the trust property which is to be so applied.

Application of section

(6) This section applies to any imperfect trust provision, except an imperfect trust provision which, before this Act came into force, was declared to be invalid by a court of competent jurisdiction, or pursuant to which property, or income arising from property, was paid or conveyed to, or applied for the benefit of, one or more persons who would have been entitled by reason of the invalidity of the imperfect trust provision. *New*.

Non-charitable trusts to take effect as powers

82.—(1) A trust that is solely for one or more specific non-charitable purposes takes effect as a power for all purposes, except with regard to any purpose that is illegal or contrary to public policy.

Interpretation

R.S.O. 1980, c. 374

(2) A specific purpose under section 16 of the *Perpetuities Act* and under this section means a purpose which as the object of a power and on a proper construction is certain. *New*.

PART IX

GENERAL

Who may apply for orders

83.—(1) Except as otherwise provided in this Act, an order of the Court under this Act may be made upon the application of any person, whether or not under disability, who is beneficially interested in the trust property, or upon the application of one or more trustees of the trust.

Where trust property mortgaged

(2) An order under this Act concerning trust property or an interest therein that is subject to a mortgage may be made upon the application of any person, whether or not under disability, who is beneficially interested in the trust property, or upon the application of any person interested in the money secured by the mortgage. R.S.O. 1980, c. 512, s. 16, *amended*.

Indemnity

84. This Act or an order purporting to be made under it is a complete indemnity to all persons for any acts done under the Act or order, as the case may be. R.S.O. 1980, c. 512, s. 63.

Costs may be ordered to be paid out of trust property

85. The Court may order all or part of the costs of and incidental to any application, order, direction, conveyance, assignment or transfer under this Act, to be paid out of the trust property in respect of which the order is made, or out of the income thereof, or to be borne and paid in such manner and by such persons as the Court considers proper. R.S.O. 1980, c. 512, s. 64, *amended*.

Trustees buying or selling

R.S.O. 1980, c. 520

86. A trustee who is a vendor or a purchaser may sell or buy without excluding the application of section 1 of the *Vendors and Purchasers Act*. R.S.O. 1980, c. 512, s. 62.

Application of R.S.O. 1980, c. 374

87. Where in the administration of a trust any question relating to the disposition, transmission or devolution of trust property arises, including the termination of a trust or an accumulation directed under a trust or other disposition, and it becomes relevant to inquire whether a person is or at a relevant date was or will be capable of procreating or giving birth to a child, section 7 of the *Perpetuities Act* applies to any such question as it applies to questions concerning the rule against perpetuities. R.S.O. 1980, c. 512, s. 65, *amended*.

R.S.O. 1980, c. 374

Things done before Act comes into force

88. This Act does not affect the legality of any act or thing done before this Act comes into force. *New*.

Crown bound

89. The Crown is bound by this Act. *New*.

Repeals

90. The following Acts are repealed:

1. The *Trustee Act*, being chapter 512 of the Revised Statutes of Ontario, 1980.

2. The *Variation of Trusts Act*, being chapter 519 of the Revised Statutes of Ontario, 1980.

Commencement

91. This Act comes into force on the day of 198 .

Short title

92. The short title of this Act is the *Trustee Act, 198* .

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